80-2054

NO. _____

Office-Supreme Court, U.S.
FILED
JUN 4 1981
ALEXANDER L. STEVAS,
CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1980

JOHN BUETTNER-JANUSCH,
Petitioner,

v.

UNITED STATES OF AMERICA,
Respondent.

APPENDIX TO PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

PETER L. ZIMROTH
80 Pine Street
New York, New York 10005
(212) 422-4030
Attorney for
John Buettner-Janusch

KOSTELANETZ & RITHOLZ
Jules Ritholz
Stuart E. Abrams
Of Counsel

THE PAUL M. HARROD COMPANY, BALTIMORE, MARYLAND 21234

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APPENDIX A

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

No. 876—September Term, 1980

(Argued March 5, 1981 Decided April 6, 1981)

Docket No. 80-1430

UNITED STATES OF AMERICA,

Appellee,

—against—

JOHN BUETTNER-JANUSCH,

Defendant-Appellant.

Before:

KAUFMAN and TIMBERS, *Circuit Judges,* and WARD, *District Judge.**

Appeal from a judgment entered in the United States District Court for the Southern District of New York,

* Of the United States District Court for the Southern District of New York, sitting by designation.

Charles L. Brieant, Jr., *Judge*, convicting appellant of narcotics offenses and of knowingly making false statements to government officials.

Affirmed.

ROANNE L. MANN, Assistant United States Attorney for the Southern District of New York (John S. Martin, Jr., United States Attorney, Robert S. Litt, Assistant United States Attorney, of counsel), *for Appellee.*

PETER L. ZIMROTH (Jules Ritholz, Stuart E. Abrams, Kostelanetz & Ritholz, New York, N.Y., of counsel), *for Defendant-Appellant.*

KAUFMAN, *Circuit Judge:*

This case chronicles the tragic culmination of the career of Dr. John Buettner-Janusch, one of the world's leading authorities on physical anthropology. The Government established that Dr. Buettner-Janusch, in violation of both the criminal law and his duty to the academic community, manufactured illegal drugs in his laboratory at New York University ("NYU"). Buettner-Janusch's illicit activities were first brought to light by the private investigative work of his undergraduate research assistant, Richard Macris, and a fellow Professor of Anthropology, Dr. Clifford Jolly. This appeal derives its legal significance from the Government's response to Macris's

and Jolly's contentions. Deciding to eschew the customary procedure of securing a warrant to search the defendant's laboratory, the Government relied instead on the apparent authority of Macris and Jolly to consent to the investigation. We are thus faced with the difficult task of evaluating the power of third parties to permit governmental intrusion into an area which a defendant reasonably regards as private. We are of the view that the circumstances present here confirm that Macris and Jolly had the requisite authority. Accordingly, we agree with Judge Brieant that the Government's conduct did not violate the Fourth Amendment.

I.

Because the constitutionality of an allegedly unlawful search depends to a large degree on underlying circumstances, we must set out the facts in some detail.

A grand jury filed a six count indictment on October 3, 1979, charging Buettner-Janusch with: conspiracy to manufacture and distribute LSD, methaqualone, and other controlled substances; manufacturing and possessing with intent to distribute approximately 1.2 kilograms of methaqualone; distributing and possessing with intent to distribute cylert pemoline, a controlled stimulant; conspiracy to obstruct a criminal investigation, and, in counts 5 and 6, knowingly making false statements to two Assistant United States Attorneys. Shortly thereafter, Buettner-Janusch moved to suppress certain evidence seized from his laboratory on May 17, 1979 by agents of the Drug Enforcement Administration (DEA). Judge Brieant filed three comprehensive opinions, in which he summarized five days of evidentiary hearings and discussed all of the defendant's claims.

These hearings established that in 1973, Buettner-Janusch relinquished his position as Professor of Anthropology at Duke University to become Chairman of the Anthropology Department at NYU. To accommodate the defendant's research, and to house the equipment he had brought with him from Duke,[1] the University remodeled a section of the fourth floor of Rufus Smith Hall. Prior to Buettner-Janusch's arrival, the front two-thirds of that floor were occupied by offices. Professor Jolly's laboratory was located at the rear of the building. During the remodeling process, the offices were eliminated. But the masonry wall that separated them from Jolly's research facility was left intact, except that the door in the middle of the wall was taken off its hinges, leaving an open passageway. After the remodeling, access to Jolly's laboratory could be gained either by passing through Buettner-Janusch's new laboratory and through the open doorway, or by using a freight elevator situated at the rear of Jolly's laboratory.

At Buettner-Janusch's invitation, Jolly and the graduate students who assisted him made frequent use of some of the equipment in the new laboratory, including the deionized water, the aspirator, the gas line, and the measuring scales. They used the rest of the new facilities less regularly; for example, Jolly could not remember using the fume hood at all in 1979.

Access to the laboratory was not limited to Buettner-Janusch and Jolly. Richard Macris, an NYU undergraduate whom Buettner-Janusch had hired as a laboratory assistant in 1977, also had keys to the door of the new

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1 One of the items of equipment Buettner-Janusch transported from Duke was a fume hood, a glass walled enclosure designed to prevent toxic gases from escaping into the laboratory.

laboratory. The defendant attempted to portray Macris as a mere errand boy, but Judge Brieant found that Macris had "full use of all the chemicals [in Buettner-Janusch's laboratory], and he frequently performed experiments . . . at defendant's request." *United States* v. *Buettner-Janusch*, No. 79 Cr. 710-CLB, slip op. at 5 (S.D.N.Y. July 7, 1980).[2]

In early February 1979, Macris began to suspect that some of the chemicals Buettner-Janusch had asked him to synthesize were illegal drugs, or so-called controlled substances. He reported his suspicions to Jolly, who advised him to keep a diary of what he observed. Jolly, too, commenced an inquiry into Buettner-Janusch's work, taking samples of various chemicals, recovering scraps of paper from garbage pails, and photographing suspicious containers.

Alarmed by what they found, Macris and Jolly met with Macris's brother Robert, a practicing New York attorney, to tell him they believed Buettner-Janusch was manufacturing methaqualone. Fearful of making a false accusation against someone of Buettner-Janusch's prominence, they decided to secure more evidence before going to the authorities. Robert arranged, through intermediaries, to have the surreptitiously obtained samples tested on a confidential basis at the DEA laboratory in New York City. In mid-May, the Macris brothers and Jolly received word that the DEA had found the samples to contain a high concentration of methaqualone.

Several days later, in the early afternoon of May 16, they conveyed their startling findings to Dr. John Sawhill,

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2 During the evidentiary hearings, Macris testified that he had permission to "enter all areas within the laboratory to locate chemicals and for other purposes."

then-President of NYU, and to Andrew Schaffer, NYU's general counsel. Later that day, Schaffer, Jolly, and Richard and Robert Macris met with Assistant United States Attorney Dominic Amorosa and DEA Agent Jack Toal in the U.S. Attorney's office for the Southern District of New York. There, Richard turned over the diary he had compiled on Buettner-Janusch's activities, and Jolly delivered samples of the compounds the defendant had synthesized and relinquished certain photographs he had taken in defendant's laboratory. Macris and Jolly also apprised the federal authorities of the results of the confidential tests the DEA had conducted. Confident that this evidence satisfied the requirement of probable cause, Amorosa proposed obtaining a warrant to search the laboratory. In response, Schaffer suggested that NYU could consent to a search, thereby obviating the need for a warrant. He added, however, that final authorization would have to come from President Sawhill. Hopeful that permission would soon be forthcoming, Amorosa asked Jolly and Richard Macris to assist the DEA agents in the search of defendant's research facility. They readily agreed.

Schaffer relayed Sawhill's consent the following day, and the quest to discover whether Buettner-Janusch had ventured into illegal drug-making was planned for approximately 10 o'clock that night. At the appointed hour, while Buettner-Janusch was attending a formal dinner, Richard and Robert Macris met Jolly, Toal, and five other DEA agents, including supervisory chemist Jeffrey Weber, outside Rufus Smith Hall. After assuring himself that no one was in the laboratory, Jolly admitted the search party, using his key to gain entry. He and Richard Macris pointed out suspicious containers to the agents, who, at Weber's instructions, seized several controlled substances.

They found methaqualone in the fume hood and on a laboratory bench, marijuana in the new laboratory's "cold room," lysergic acid hydrazide on a laboratory bench, and a receptacle containing two vials of ergotamine tartrate, a precursor of LSD, which Jolly retrieved from the laboratory freezer.

Much of the testimony at the hearing centered on the circumstances under which Weber ordered the seizure of the methaqualone and the LSD precursors. Weber stated that he observed four translucent plastic containers lying in the fume hood almost as soon as he entered the laboratory. He did not inspect them immediately, however, for his attention was drawn to an open notebook lying on a laboratory bench. The notebook contained a series of entries which Weber interpreted as the melting points of methaqualone-containing compounds in various stages of purification. These entries corresponded to the markings on the receptacles in the fume hood. But this was not the only information Weber had to support his belief that these receptacles contained methaqualone. As a result of Jolly's prior investigation, Weber already knew that methaqualone had been detected in the laboratory, and during the search he discovered several jars filled with methaqualone precursors. Upon examining the containers, he observed that they held a white, granular solid, resembling an impure form of the drug.[3] The chemist admitted, however, that even with all of this information he was not sure that the receptacles contained a controlled substance. But his strong suspicion ripened into certainty when he unscrewed the top of one of the containers and

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[3] Judge Brieant described these containers as "sufficiently transparent to allow observation of the nature and appearance of the substances inside." *United States v. Buettner-Janusch*, No. 79 Cr. 710-CLB, slip op. at 7, (S.D.N.Y. May 28, 1980).

detected the powerful odor of toluene, a solvent regularly used in methaqualone synthesis.

In contrast, the translucent container Jolly retrieved from the freezer provided Weber with little information as to its contents. Although this receptacle was constructed of plastic with the same opacity as that used in the methaqualone containers, the contents of this receptacle—two vials which proved to hold ergotamine tartrate—were not discernible through the container walls. And because Weber had no prior information that LSD was being synthesized in the laboratory, he had no reason to believe that this receptacle contained LSD precursors.

Based on these factual findings, and relying primarily on *Arkansas* v. *Sanders*, 442 U.S. 753 (1979), and *United States* v. *Dien*, 609 F.2d 1038 (2d Cir. 1979), *adhered to*, 615 F.2d 10 (2d Cir. 1980), Judge Brieant suppressed the receptacle retrieved from the freezer, but determined that the seizure of the containers of methaqualone did not offend the Fourth Amendment.[4] The judge also ruled that only Macris and Jolly had authority to consent to the search; the University did not.

At trial, the Government introduced the admissible fruits of the May 17 search, supplemented by the testimony of Schaffer, Richard Macris, Jolly, Toal, and Weber. Before the case went to the jury, Judge Brieant dismissed the obstruction of justice count. The jury convicted the defendant on four of the five remaining counts, and acquitted him of distributing cylert pemoline. Judge Brieant sentenced Buettner-Janusch to a total of five years' imprisonment, to be followed by a two-year special parole term on the manufacturing count.

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[4] The lower court also suppressed evidence seized during a warrantless search of a locked enclosure in the basement of Rufus Smith Hall on August 2, 1979. The legality of that search is not before us.

II.

Having stated the factual background with some detail, we approach our discussion of the law. It is basic Fourth Amendment jurisprudence that when the Government seeks to intrude upon an individual's legitimate expectations of privacy, it must either obtain a warrant from a neutral magistrate or bring its search within one of the few "jealously and carefully drawn" exceptions to the warrant requirement, *Jones* v. *United States*, 357 U.S. 493, 499 (1958). Throughout this litigation, the prosecution has maintained that the May 17 search was validated by the consent of Jolly and Richard Macris.[5] To satisfy the burdens imposed on it by the third party consent principle, the Government must show, by a preponderance of the evidence, that the consent to search was freely and voluntarily given, *see Schneckloth* v. *Bustamonte*, 412 U.S. 218 (1973), and was obtained from someone "who possessed common authority over or other sufficient relationship to the premises or effects sought to be inspected." *United States* v. *Matlock*, 415 U.S. 164, 171 (1974). Since third party consent does not involve the vicarious waiver of a defendant's constitutional rights, it validates a search only when a defendant can be said to have assumed the risk that someone having authority over the area to be searched would permit the governmental intrusion in his own right. *See id.* at 171 n.7; *United States* v. *Block*, 590 F.2d 535, 539-40 & n.5 (4th Cir. 1978). Buettner-Janusch assails the constitutionality of the May 17 search both on the ground that consent was

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[5] Although the Government urges us to uphold the University's power to consent to the search, in light of our disposition of the other issues raised in this appeal, we need not reach that question.

not given voluntarily and on the theory that Jolly and Macris lacked the requisite authority to grant permission to search.[6]

A.

The question of the voluntariness of Macris's and Jolly's consent need not detain us long. Whether consent was given voluntarily is an issue of fact, to be determined by the trial judge, who is to draw his findings from all of the appropriate and relevant circumstances. *Schneckloth* v. *Bustamonte, supra,* 412 U.S. at 248-49. The court's findings will not be set aside on appeal unless they are clearly erroneous. *United States* v. *Sanchez,* 635 F.2d 47 (2d Cir. 1980); *United States* v. *Griffin,* 530 F.2d 739, 742 (7th Cir. 1976); *United States* v. *Bronstein,* 521 F.2d 459, 463 (2d Cir. 1975), *cert. denied,* 424 U.S. 918 (1976). Moreover, it is well settled that consent may be inferred from an individual's words, gestures, or conduct. *United States* v. *Griffin, supra,* 530 F.2d at 742. Thus a search may be lawful even if the person giving consent does not recite the talismanic phrase: "You have my permission to search."

Judge Brieant's finding that both Macris and Jolly impliedly consented to the May 17 search is amply sup-

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6 As a preliminary matter, we must address Buettner-Janusch's contention that because the DEA agents who conducted the search relied only on the University's power to consent, the prosecution cannot now assert that Macris and Jolly could also authorize this intrusion. This argument must be rejected, since it "ignores the settled rule that in judging the legality of a search, courts must apply an objective standard and will not be bound by the subjective 'beliefs of the arresting officer [or] the Assistant United States Attorney at trial.' *United States v. Tramontana,* 460 F.2d 464, 466 (2d Cir. 1972)." *United States v. Jenkins,* 496 F.2d 57, 72-73 (2d Cir. 1974), *cert. denied,* 420 U.S. 925 (1975). *See United States v. Ochs,* 595 F.2d 1247, 1256 (2d Cir.), *cert. denied,* 444 U.S. 955 (1979).

ported by the record. These two initiated the investigation of Buettner-Janusch's illegal activities; they reported their findings to the University and to the U.S. Attorney's Office, among others; and they readily agreed to assist the DEA agents during the raid. Moreover, the cooperative relationship that existed among Macris, Jolly, and the DEA agents on the night of the search provides strong evidence that these informants freely acquiesced in the investigation. *See United States* v. *Kurck*, 552 F.2d 1320 (8th Cir. 1977) (*per curiam*). In short, there is "no evidence . . . of coercion or other circumstances that would render consent invalid." *United States* v. *Candella*, 469 F.2d 173, 175 (2d Cir. 1972), citing *United States* v. *Rothberg*, 460 F.2d 223, 224 (2d Cir. 1972).

B.

This brings us to the heart of defendant's constitutional objections—that neither Jolly nor Macris had the authority to consent to the warrantless search of May 17. We have had several opportunities since the Supreme Court decided *United States* v. *Matlock*, *supra*, to consider the scope of the third party consent principle. The well established rule in this Circuit is that "[c]onsent to a search by one with access to the area searched, and either common authority over it, a substantial interest in it or permission to exercise that access, express or implied, alone validates the search." *United States* v. *Gradowski*, 502 F.2d 563, 564 (2d Cir. 1974) (*per curiam*). *See United States* v. *Pravato*, 505 F.2d 703, 704 (2d Cir. 1974) (*dictum*); *United States* v. *Jenkins*, 496 F.2d 57, 72 (2d Cir. 1974), *cert. denied*, 420 U.S. 925 (1975).

Judge Brieant, applying this standard, found that both Macris and Jolly had access to Buettner-Janusch's labora-

tory, that Macris had common authority over it, and that both Macris and Jolly had express or implied permission to use the facility. We find ourselves in total agreement. The simple answers are that both Macris and Jolly had keys to the defendant's laboratory, thus satisfying the access requirement of *Gradowski*. Furthermore, to perform his laboratory duties, Macris was authorized to enter any part of the laboratory and to open any jars of chemicals found there. These facts clearly establish both "common authority" and "permission to exercise access."[7] Jolly also satisfied the second branch of the *Gradowski* test because he had standing permission to use the equipment in Buettner-Janusch's laboratory, and was required to pass through it to reach his own facility.

But the constitutional inquiry does not end at this point, as Buettner-Janusch correctly contends. He main-

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[7] Macris, feigning mononucleosis, asked Buettner-Janusch for a leave of absence in early May. The defendant, who had been unable to pay Macris for any part of the work he performed in 1979, granted the request, but invited Macris to return as soon as he recovered. Buettner-Janusch now argues that these circumstances undercut the Government's assertion that Macris could consent to the search. But the questions of implied permission and common authority are not to be decided simply on the basis of an employment relationship. While such a relationship may be strong evidence of the third party's power to consent, *see United States v. Murphy*, 506 F.2d 529 (9th Cir. 1974) (*per curiam*), *cert. denied*, 420 U.S. 996 (1975); *United States v. Sells*, 496 F.2d 912 (7th Cir. 1974) (*per curiam*), its absence is not determinative, *see United States v. Matlock*, 415 U.S. 164 (1974) (joint tenant could consent to a search of common area); *Frazier v. Cupp*, 394 U.S. 731, 740 (1969) (joint user could consent to search of duffel bag); *United States v. Long*, 524 F.2d 660 (9th Cir. 1975) (wife could consent to search of house she formerly shared with husband); *United States v. Jenkins*, *supra* (joint tenant could consent to search of apartment); *United States v. Cataldo*, 433 F.2d 38 (2d Cir. 1970), *cert. denied*, 401 U.S. 977 (1971) (same).

Moreover, Buettner-Janusch did not regard Macris's departure as permanent. He understood that Macris would resume working in the laboratory as soon as he "recovered" from his feigned illness. Indeed, Macris returned to the facility in June, 1979, several weeks after the search, and began to work for Jolly.

tains that even if Macris and Jolly could allow the DEA agents to enter the laboratory, they could not authorize an examination of its enclosed areas, such as the fume hood, cabinets, cold room, and freezer. This is so, the defendant argues, because he had an independent expectation of privacy in these areas.

To evaluate this claim, we must explore the relationship between the doctrine of third party consent and the concept of expectation of privacy. Without engaging in "metaphysical subtleties," *Frazier* v. *Cupp*, 394 U.S. 731, 740 (1969), we recognize that not all the areas or containers in a room are equally private. As an illustration, a person has a greater expectation of privacy related to items hidden in his wall safe than in those scattered over his kitchen table. If a specific area is in fact surrounded by an independent privacy interest, a government agent must either obtain a warrant to search it or is required to bring his examination within one of the exceptions to the warrant requirement. Thus, the Government may scrutinize even the most private enclosure if the third party has the authority to permit the intrusion. Here too, the third party's power to consent is to be tested under the familiar *Gradowski* standard.

We agree with the district court that Buettner-Janusch forfeited any reasonable expectation of privacy by granting permission to use the enclosed area of his laboratory to Macris, Jolly, and at least eight other persons.[8] But

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[8] The defendant argues that because he transported the fume hood from Duke University to NYU, he must have had a heightened expectation of privacy concerning it. But even if we were to regard this as evidence that Buettner-Janusch enjoyed some sort of property right to the hood, his reliance on the law of property is misplaced. Standing alone, such rights do not necessarily give rise to interests protected by the Fourth Amendment. *See Katz v. United States*, 389 U.S. 347 (1967); *Jones v. United States*, 362 U.S. 257 (1960). And although the

assuming arguendo that Buettner-Janusch retained an independent privacy interest in these areas, both Macris and Jolly had access and at least implied permission to use them. Thus, this aspect of the May 17 search was also lawful. *See United States* v. *Gradowski, supra.*

Finally, Buettner-Janusch maintains that even if the Government could search the fume hood and the other enclosed areas, it could not examine the containers of methaqualone found in the hood or the receptacle containing the LSD precursors which Jolly retrieved from the freezer. Our response to this is that the analysis we have recited has disposed of this claim. If the defendant had an independent, reasonable expectation of privacy in these containers, the agents either had to secure a warrant or obtain valid third party consent. To determine whether the defendant had a legitimate privacy interest in a particular receptacle, we look to *Arkansas* v. *Sanders,* 442 U.S. 753 (1979), which instructs that:

> Not all containers and packages found by police during the course of a search will deserve the full protection of the Fourth Amendment. Thus, some containers (for example, a kit of burglar tools or a gun case) by their very nature cannot support any reasonable expectation of privacy because their contents can be inferred from their outward appearance. Similarly, in some cases the contents of a package will be open to "plain view," thereby obviating the need for a warrant.

Id. at 764 n.13. *See United States* v. *Mannino,* No. 80-1206, slip op. at 340 (2d Cir. Nov. 18, 1980) (requiring

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defendant may have derived a legitimate expectation of privacy by exercising his right to prevent others from using the hood, *see Rakas* v. *Illinois,* 439 U.S. 128, 143 n.12 (1978), the fact remains that he did not exercise this right with respect to Macris or Jolly.

some "objective, external evidence of an expectation of privacy."); *United States* v. *Dien*, 609 F.2d 1038 (2d Cir. 1979), *adhered to*, 615 F.2d 10 (2d Cir. 1980) (holding that marijuana hidden within sealed cardboard boxes was not within "plain view," so that the boxes could not be opened without a warrant).

Judge Brieant correctly applied the *Sanders* rule to the various containers seized in Buettner-Janusch's laboratory. Agent Weber lawfully examined the containers discovered in the fume hood since he could properly infer they contained methaqualone from their outward appearance.[9] Indeed, when viewed in the context in which they were seized, the compounds were, for all practical purposes, in "plain view." *See United States* v. *Callabrass*, 607 F.2d 559, 564 (2 Cir. 1979), *cert. denied*, 446 U.S. 940 (1980). In contrast, Buettner-Janusch retained a legitimate expectation of privacy in the container Jolly removed from the freezer, since this object divulged no clues as to its contents until Weber removed its top.[10] But applying

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9 At the moment Weber opened these items, he already knew that Jolly had obtained a sample of methaqualone from the laboratory. He had also discovered partially empty jars containing precursors to methaqualone, and had examined the melting point data in the laboratory notebook. Furthermore, he could perceive through the containers' translucent walls that they were filled with a whitish granular substance that resembled methaqualone in an impure state.

10 Judge Brieant concluded his analysis of the legality of Weber's search at this point, relying on *United States v. Dien, supra*, for the principle that once a government agent discovers a container in which a defendant retains a legitimate expectation of privacy, the agent may not examine it without a warrant. Although not strictly necessary to our holding, it may be useful if we explain the bearing of *Dien* on the issues before us. In *Dien*, we held unlawful an examination of three cardboard boxes partially secured with tape and found in defendants' van. We noted that the expectation of privacy surrounding a sealed package is not vitiated merely because it is found in an automobile, which itself is subject to a diminished expectation of privacy. *See*

Gradowski to that object, we note that Macris had Buettner-Janusch's clear permission to open any of the jars of chemicals in the laboratory. Presumably then, he could have examined the two vials of LSD precursors that Jolly removed from the freezer. Thus, it was lawful for DEA chemist Weber, who searched the laboratory and vials at Macris's invitation, to do the same.

Chambers v. Maroney, 399 U.S. 42 (1970); *Carroll v. United States*, 267 U.S. 132 (1925).

Dien's rationale was that the twin policies underlying the automobile exception—the inherent mobility of automobiles and the presumably lesser expectations of privacy that surround them—do not apply to luggage or similar containers discovered during an automobile search. *See Arkansas v. Sanders, supra.* In contrast, the third party consent exception rests on totally different considerations. As we have stated at some length, this principle is premised on the notion that the third party has authority to consent to the search in his own right. *See United States v. Matlock, supra.* Thus, it is incorrect to hold that because the automobile exception is inapposite in a particular case, the third party consent exception also has no application. In short, nothing in *Dien* prevents a third party from permitting a search of a sealed container, provided his authority to consent satisfies the *Gradowski* requirements.

Finally, we reject the defendant's argument that *Walter v. United States*, 447 U.S. 649 (1980), required the Government to secure a search warrant before analyzing either the samples of methaqualone it received from Jolly or the substances it seized during the May 17 search. In *Walter*, a divided Court held that although FBI agents had lawfully obtained an allegedly obscene film, they could not screen it without first obtaining a warrant. *Walter* is distinguishable from the instant case in two respects. Unlike the defendant in *Walter*, Buettner-Janusch had no independent expectation of privacy in the chemicals seized from his laboratory. These substances were either lying open on laboratory benches or were in containers that exposed their contents to the casual observer. Moreover, the governmental intrusion in *Walter* was not authorized by the consent of a third party who satisfied the *Gradowski* requirements. Here, however, the DEA obtained the samples from individuals who had access to them and permission to exercise that access. Accordingly, *Walter* does not require us to suppress this evidence.

III.

We have carefully considered the remainder of Buettner-Janusch's contentions and find them to be without merit. This is one of those hard cases in which it is difficult to explain the motives for criminal acts ruinous of an otherwise distinguished career. We do not possess the omniscience to supply the answer. The judgment of conviction is affirmed.

APPENDIX B

OPINION OF JUDGE BRIEANT (filed March 27, 1980)

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

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UNITED STATES OF AMERICA :

-v- : 79 Cr. 710-CLB

JOHN BUETTNER-JANUSCH, : MEMORANDUM AND ORDER

Defendant. :

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Brieant, J.

Defendant, Dr. John Buettner-Janusch, was indicted on October 3, 1979 and charged with: (1) conspiracy to manufacture and distribute certain controlled substances [21 U.S.C. §§ 812, 841(a)(1), 841(b)(1)(B) and 841 (b)(2)]; (2) actual manufacture and distribution of certain controlled substances (21 U.S.C. §§ 812, 841(a)(1), 841(b)(1)(B) and 841(b)(2), and 18 U.S.C. § 2]; (3) conspiracy to obstruct a criminal investigation [18 U.S.C. §§ 1503, 1510, 1001]; and (4) knowingly making false statements to Government

investigators [18 U.S.C. §1001]. By motion filed October 29, 1979, defendant moves, pursuant to Rule 12(b)(3), F.R.Crim.P., to suppress certain physical evidence which the Governmentobtained throught two searches and seizures, without warrant and through a private individual, who took the items seized and turned them over to the Government. Defendant also moves by motion dated November 5, 1979, pursuant to Rule 12(b)(1), F.R.Crim.P., to suppress certain tape recordings of conversations that defendant had with third parties during the Government's investigation that led to defendant's indictment. Finally, defendant moves, by motion docketed November 16, 1979, for an order either dismissing the indictment pursuant to Rule 12(b), F.R.Crim.P., or striking prejudicial surplusage, pursuant to Rule 7(d), F.R.Crim.P.

An evidentiary hearing was held on December 3, 12, 13 and 26, 1979, and January

3, 1980 to resolve disputed factual issues on the motion to suppress physical evidence. All the motions were fully submitted on February 26, 1980.

Facts

Stated below are my findings of fact on the evidentiary hearing, and certain disputed facts presented in connection with the motions to dismiss the indictment and to suppress the tape recordings.

In 1973 Buettner-Janusch left Duke University, where he had been a professor of anthropology, to become the Chairman of the Anthropology Department at New York University ("NYU"). To enable Buettner-Janusch to continue his research, and to house the large amount of special equipment that was involved in that research, NYU redesigned a portion of the fourth floor of Rufus Smith Hall, located at 25 Waverly Place, New York City, as a physical anthropology laboratory (the "new lab"). Adjoining

this new lab is the existing laboratory of NYU anthropology professor Clifford Jolly (the "old lab"). Although the old lab and the new lab are separated by a masonry wall, an open doorway allows easy access between them. Because the new lab contains equipment that is not available in the old lab, and presumably motivated by professional courtesy, Buettner-Janusch informed the NYU administration that he would permit Professor Jolly to use "his" laboratory, and the equipment therein, and there is evidence that Jolly did use the new lab on those occasions when he required access to the de-ionized water, the aspirator, the gas line and the measuring scales, all items found only in the new lab. In addition, the physical layout of the fourth floor of Rufus Smith Hall requires persons entering Jolly's lab to pass through Buettner-Janusch's lab, unless a rear freight elevator is used. Thus, if an ordinary visitor enters Rufus

Smith Hall by the front door, and takes the passenger elevator to the fourth floor, that person will have to walk through the new lab constructed for Buettner-Janusch in order to reach the existing lab of Jolly. The only alternative is to take the freight elevator from the first floor, which opens in the rear of the old lab. This elevator is normally used only for freight and requires an operator, but is occasionally employed as a passenger elevator when the regular front elevator is out of service. This notwithstanding posted signs to the contrary. The door on the fourth floor which opens into the new lab and which also provides access to Jolly's lab, was secured by two locks prior to May 17, 1979. There is some dispute over who had keys to those locks, but it is conceded that Buettner-Janusch, Jolly and Richard Macris, whose

status as a laboratory assistant and NYU graduate student is discussed below, all had keys to unlock this door.

This new lab was the setting for the first Government search, which occured on May 12, 1979. In early February 1979, Richard Macris, a NYU student and a laboratory assistant who had been hired to work for NYU in the new lab by Buettner-Janusch in June 1977, became of certain chemicals present in the new lab, believing them to be controlled substances that were being manufactured illegally. Macris related these suspicions to Jolly, who advised him to keep a diary of what he saw in the lab. Jolly himself began taking samples of various chemicals in the new laboratory, and stored these samples in plastic tubes with labels indicating the date of collection. From these dates, it is apparent that Jolly collected chemicals from the new lab on February 12, 18, March 7, 21, April 1, and 16, 1979.

In addition to these samples, Jolly collected other evidence of illegal activity during March, April and early May. He found marijuana seeds in a drawer in his lab, gelatin capsules on top of that drawer, and a trace of a substance alleged to be LSD from the cold room in Buettner-Janusch's lab. He also retrieved several scraps of paper and an envelope from a garbage pail in the new lab, and took a number of photographs of the suspicious containers and experiments therein. The photographs were turned over to the Government on May 16, 1979. The marijuana seeds and trace of substance alleged to be LSD were turned over to the Government on May 24, 1979.

During this time, on March 7th, Richard Macris and Jolly met with Macris' brother Robert, a practicing attorney in New York, and told him of their suspicions and that they had taken samples. Robert Macris told them to continue their close

watch of the situation, and on March 26th, Robert Macris met with Edward Boyle, a cousin, who was also an attorney. Macris told Boyle of the possibility that controlled substances were being manufactured at the NYU lab where Richard was working, and that some samples of the substances had been taken. On April 25th, after speaking to Richard Macris the day before, Boyle called the United States Attorney's Office for the Eastern District of New York, and was referred to Chief Assistant Bernard Fried, with whom he was acquainted. Boyle told Fried that he wanted to have a substance tested by a reputable laboratory, that the source of the substance would have to remain undisclosed, and that he could offer no explanation on the results of such a test. Fried offered to have the samples tested on a confidential basis at the Drug Enforcement Agency ("DEA") laboratory, and Boyle, after

speaking with Robert Macris, accepted this offer. On Friday evening, April 27th, Robert Macris, delivered five samples that he had received from Jolly, to Boyle, and Boyle turned these over to Fried on May 2, 1979 in the presence of a DEA agent. Boyle told Fried that a relative had collected the samples from a university laboratory where he worked, but did not disclose the name of the relative, nor the name of the university lab. Shortly before the samples were turned over to the DEA for testing, Richard Macris stopped attending classes at NYU and at the suggestion of his brother Robert, did not report for work at the lab. He told Professor Buettner-Janusch that he had contracted mononucleosis, and Buettner-Janusch told him to return when he recovered. He remained absent from work until June, when he began working the old lab for Jolly.

Approximately, two weeks later Fried received an oral report from DEA that the samples contained a controlled substance, methaqualone. Fried then called Boyle and told him the results of the test, but did not insist that Boyle's relative go to the proper authorities. He only cautioned Boyle that the relative would have to be careful if he did not report what he knew.[1/] Furthermore, Fried did not request that Boyle or his relative continue to collect samples from the lab, or pursue any other activity that might provide additional evidence for the Government.

Boyle relayed the results of the tests to Richard and Robert Macris, and they in turn informed Jolly.

In the early afternoon of May 16, 1979, a few days after receiving the test results, the Macris brothers and Jolly met with the then President of NYU, Dr. John Sawhill,

and NYU's general counsel, Andrew Schaffer, Esq. Richard Macris and Jolly related their suspicions and described the events that had occurred over the past three months. Schaffer recommended that the entire matter be referred to the federal authorities. Robert Macris approved this course of action after conferring with his counsel, and with President Sawhill's approval Schaffer called the United States Attorney's Office for the Southern District of New York. A meeting was scheduled for that afternoon, and Schaffer accompanied Richard and Robert Macris and Jolly to the United States Attorney's Office for that meeting. Richard Macris and Jolly presented their information and evidence to an Assistant United States Attorney and to a DEA agent, Jack Toal, and informed them of the prior participation of the United States Attorney's Office for the Eastern District,

which had caused the DEA to test the samples on a confidential basis. In addition, Richard Macris turned over his diary of the events that had occurred in the lab, and Jolly turned over some samples collected from the new lab, as well as a number of photographs that he had taken in the laboratory.

At that time, Schaffer suggested that NYU could consent to a search of the laboratory by the Government, thereby obviating the need for a search warrant, and stated that he would consent to such a search. However, he stated that he would have to talk with President Sawhill before final consent was given. When asked by the Assistant U.S. Attorney, both Jolly and Richard Macris agreed to go along and assist the Government on a search of the laboratory.

Schaffer spoke with Sawhill on May 17th and received the President's approval for a search of the new lab by the Government. Schaffer then relayed this information to the United States Attorney's Office for the Southern District, and the search was planned for that evening.[2/] That afternoon, Jolly visited the new lab, and took several more photographs.

At approximately 10 o'clock that night, Jolly, Richard Macris, Robert Macris and six DEA agents, including Jack Toal, met outside Rufus Smith Hall. Toal and Jolly went up to the fourth floor together to see if anyone was present in the new lab, and found it to be empty. There was no risk of interruption of the search by Buettner-Janusch, who was known to be attending a formal dinner that evening. Jolly opened the door to the lab with his keys, and the other agents and Richard

Macris were brought up to commence the search. Both Jolly and Richard Macris assisted the agents, pointing out what they considered to be suspicious, and the agents seized a number of objects and chemicals which are fully set forth in the stipulation herein dated December 26, 1979. The items seized were described as controlled substances, and are as follows: methaqualone found within the fume hood (DEA Exs. 3-5); marijuana found in the new lab cold room (DEA Ex. 10); and lysergic acid hydrazide found on a lab bench (DEA Ex. 16). Some of the evidence was discovered in plain view, lying out on the lab benches, and some was behind closed cabinet doors and inside the cold room and the freezer. As the search was going on, either Robert or Richard Macris suggested that the entry be disguised as a burglary, so that Buettner-Janusch would not suspect those with keys, including

Richard Macris and Jolly, when he found that a number of items were missing or disturbed in the new lab. One of the DEA agents, using a tire iron found in the lab, accomplished this desired appearance by ripping off the lock and frame of the laboratory door.

Following the May 17th search, Jolly continued his citizen's investigation, apparently without the knowledge, permission or request of the Government. He took more photographs of the new lab during May, and also taped a telephone conversation that he had on May 20th with Buettner-Janusch. Although Jolly met with DEA agent Toal on May 25th, and turned over the marijuana seeds and the trace of a substance alleged to be LSD that he found in March, he did not then inform Toal of his tape. Additionally, Jolly taped a face-to-fact meeting on June 10, 1979 with Buettner-Jansuch and Danny Cornyetz, a student and lab assistant.

Richard Macris also taped conversations that he had with Buettner-Janusch after the May 17th search, but this was done under the supervision of the Government. On May 23, 1979 Richard Macris taped a telephone conversation that he had with Buettner-Janusch, and then met him later in Buettner-Janusch's office wearing a Nagra recording device, thereby obtaining a tape of their face-to-face conversation. Macris wore and used this Nagra device twice more, on June 1st when he met again with Buettner-Janusch, and on June 5th when he met both with Buettner-Janusch and fellow student Danny Cornyetz. Finally, Macris telephone Buettner-Janusch on June 8th and recorded that conversation. Three other tapes were made during the investigation, two by Danny Cornyetz after he began to cooperate with the Government, and one by laboratory assistant Lisa

Forman. Cornyetz recorded telephone conversations that he had with Buettner-Jansuch on June 27 and July 2, 1979, and Forman recorded a telephone conversation with Buettner-Janusch on an unspecified date.

In addition to these tape recordings, the Government began an official investigation through a Grand Jury, and Buettner-Janusch was subpoenaed to appear before this Grand Jury on May 22, 1979. He appeared on that date with an attorney, but his testimony was adjourned until a later date. Defendant then accompanied the Assistant U.S. Attorney in chrge of the investigation to an office, where, with is attorney present, he answered questions asked by the Assistant. Buettner-Janusch was questioned again by the Assistant on June 14, 1979, and in the presence of counsel he answered several questions.

On August 2, 1979 the Government also searched, without a warrant, Buettner-Janusch's storeroom in the basement of Rufus Smith Hall. This storeroom was an 8' by 4' area, surrounded by three walls and a large building pillar that made up the fourth wall. A gap between one of the walls and the building pillar was closed off by a floor-to-ceiling bookcase filled with books, and the storeroom was thus totally enclosed. The only door to the room had a lock.

On July 17, 1979 Buettner-Janusch called Dr. Anna Marie Cantwell, a research associate in anthropology at NYU and asked her to have several locks in the anthropology department changed, including the lock to the basement storage room used by him. The reason given by Buettner-Janusch for this request was that he discovered a student making drugs in the new lab, and that he

was afraid that the student would try to "frame" him. According to Dr. Cantwell, Buettner-Janusch did not trust anyone else to supervise the changing of the locks.[3/]

Dr. Cantwell arranged for a locksmith not affiliated with NYU to change the locks on June 19th, and on that date she took the locksmith down to the basement by the freight elevator to install a new lock on the storeroom door. Professor Jolly asked to come along to supervise, and Richard Macris was also present. While the locksmith changed the lock to Buettner-Janusch's storeroom, Jolly memorized the serial number on the new Medeco lock that was being installed.[4/] Later that day, Jolly went to a different locksmith, and obtained a duplicate key to the lock by using the serial number which he had observed while the new lock was being installed. Therefore, although Dr. Cantwell had been instructed by defendant to hold the new keys to the storage room until his

return, and to give these keys to no one, Jolly had a key to the new lock on the very day it was installed. Neither Cantwell nor the Government knew in advance of Jolly's plan to secure this key.

After obtaining the duplicate key, Jolly went down to the storage room and inspected it himself, finding a few chemicals and bottles of gelatin capsules. Some of these items were in cartons, but Jolly testified that he did not open any sealed cartons during this search. When he concluded this inspection, he reported to the United States Attorney's Office for the Southern District of New York that he had a key to the storeroom and that he had entered and searched that room. Some time later, Jolly spoke with DEA Agent Toal and gave him the key.

At the end of July, the United States Attorney's Office for the Southern District called General Counsel Schaffer of NYU and asked him for consent to enter and search the basement storage room assigned to Buettner-Janusch. Schaffer gave this consent for the University and on August 2, 1979 DEA agents Toal and Petrucci, accompanied by Richard Macris, opened the storeroom door with Jolly's key and seized several cartons of incriminating substances.

The Indictment Motions

Defendant moves first to dismiss the indictment in this case pursuant to Rule 12(b)(1), F.R.Crim.P., because of the prosecution's alleged abuse of the Grand Jury proceedings. In the alternative, defendant moves to have certain alleged prejudicial surplusage stricken from the indictment pursuant to Rule 7(d), F.R.Crim.

P. and also to have Count 6 stricken from the indictment pursuant to Rule 12(b)(1), F.R.Crim. P. on the grounds that it is duplicitious.

Defendant cites three examples of Grand Jury abuse by the prosecution. First, he claims that the Government suppressed exculpatory evidence favorable to the defense. Specifically, defendant contends that the prosecution failed to provide the Grand Jury with two letters from fellow scientists attesting to Buettner-Janusch's character and explaining his research, as well as testimony from one of his former assistants that Buettner-Janusch spent little time in the laboratory, and was involved more in administrative duties. On the other hand, the Government claims that it did introduce some evidence in the Grand Jury proceedings that was favorable to the defense.

The Court of Appeals has recognized that "a prosecutor is not presently obligated to search for and submit to a grand jury evidence favorable to the defense or negating guilt, when it has not been requested by the grand juyr." United States v. Ciambrone, 601 F.2d 616, 622 (2d Cir. 1979). However, "where a prosecutor is aware of any substantial evidence negating guilt he should, in the interest of justice, make it known to the grand jury, at least where it might reasonably be expected to lead the grand jury not to indict." Id., at 623. Applying these rules to the case before us, I conclude that the letters from the two scientists and the testimony of Buettner-Janusch's former assistant were not substantial evidence that "might reasonably be expected to lead the grand jury not to indict." Id. This is the sort of crime which could only be committed by

an academic of good character and reputation; who else would be entrusted with control of the laboratory in a leading University?

Although the letters provide some explanation for Buettner-Janusch's possession of chemicals in general, they are not specific, and any evidence of good character that they contain is at most a matter for the trial jury where the standard of proof is higher than that required to indict. The testimony of Buettner-Janusch's former assistant may show that defendant was not in the lab every day, but it does not negate the Government's theory that Buettner-Janusch was the head of a conspiracy to manufacture and distribute certain controlled substances using NYU personnel and facilities.

Defendant also contends that the prosecution "mistreated" two witnesses, Martin Marion and Bruce Greenfield, who offered

exculpatory testimony. The Government allegedly threatened to prosecute Marion, an honorary research associate in anthropology at NYU, if he persisted in his story. In addition, Bruce Greenfield allegedly tried to make a favorable statement to the Government, but the Assistant refused to listen to him. None of this "mistreatment" is claimed to have occurred in the presence of the Grand Jury. The prosecution neither admits nor denies these allegations, but argues that the Grand Jury was unaffected in any event.

Even if we assume that the prosecution threatened Marion with prosecution, and refused to listen to Greenfield, it is difficult to perceive how defendant's right to an unbiased Grand Jury was affected thereby. See, United States v. Bruzgo, 373 F.2d 383 (3d Cir. 1967). These charges, even if true, do not justify dismissal of the indictment.

Finally, defendant claims that the indictment should be dismissed because the Government acted improperly with respect to certain telephone company records. Defendant alleges that when the United States Attorney's Office subpoenaed the toll records of Bruce Greenfield, Selma Greenfield (Bruce's mother) and Martin Marion from the telephone company for the Grand Jury proceedings, notice to the customers of such a subpoena was deferred for ninety days at the request of the Government. Defendant argues that this is a violation of Rule 6(e), F.R.Crim.P., and an unlawful interference with defense counsel's access to the telephone company as a witness. Defendant admits that he received these toll records from the Government in the course of pre-trial discovery. Defendant must have known that the telephone company records were

potential exhibits, and there is no allegation that the prosecution prohibited defense counsel from speaking with respresentatives of that company about the records. The only persons who appear possibly to have been prejudiced are the Greenfields and Martin Marion. Defendant lacks standing to assert their claims. I decline to dismiss the indictment because of the prosecution's request made of the telephone company.

In the alternative, defendant seeks to strike certain alleged prejudicial surplusage from the indictment, pursuant to Rule 7(d), F.R.Crim.P. For example, defendant wishes to exclude claimed "inflammatory language" such as the word "drug," which appears before the words "controlled substance" a number of times through the indictment. Defendant also claims that "prejudicial factual allegations" should be stricken. An example of these prejudicial allegations occurs in ¶¶ 6(a), 7

(2) and 7(4) of Count One, where the indictment alleges that Buettner-Janusch's possession of a book and articles relating to the synthesis of LSD is an overt act in furtherance of the conspiracy to manufacture and distribute controlled substances.

A motion to strike prejudicial surplusage pursuant to Rule 7(d) "will be granted only where it is clear that the allegation[s] complained of [are] not relevant to the charge contained in the indictment and [are] inflammatory and prejudicial." United States v. Klein, 124 F.Supp. 476, 479-80 (S.D.N.Y. 1954), aff'd. 247 F.2d 908 (2d Cir. 1957), cert. denied 355 U.S. 924 (1958); United States v. DePalma, 461 F.Supp. 778 (S.D.N.Y. 1978). This is an exacting standard, and alleged surplusage is seldom stricken. United States v. DePalma, supra at 797. After a careful reading of the indictment,

I conclude that the language of the indictment is neither inflammatory nor prejudicial. The Court has already ruled orally that the reference "also known as B-J" shall be stricken wherever it appears in the pleading. This is unnecessary prejudicial verbiage. The remainder of the allegations complained of are or may be relevant to the charges. Therefore, defendant's motion to strike must be and it is denied.

Defendant's final argument with respect to the indictment urges that the fourteen violations of 18 U.S.C. §1001 alleged in Count Six render this Count duplicitous. He contends that the Count must be stricken or reduced to one alleged violation. Specifically, Count Six charges Buettner-Janusch with making a number of false statements to the United States Attorney's Office, and defendant contends

that this violates Rule 8(a), F.R.Crim.P., as well as his rights under the Fifth and Sixth Amendments to the United States Constitution. On the other hand, the Government contends that the false statements made by Buettner-Janusch constituted a continuing course of conduct that amounts to one offense.

"An indictment is invalidly duplicitous when it joins a single count two or more distinct, separate offenses." United States v. Droms, 566 F.2d 361, 363 (2d Cir. 1977). However, although an indictment may not charge multiple offenses in a single count, the "charging of multiple means constituting a single and continuing offense [is allowed], even if the components of that single offense may otherwise be treated as separate offenses." United States v. Kearney, 451 F.Supp. 33, 36 (S.D.N.Y. 1978). The alleged false

statements made by Buettner-Janusch to the United States Attornye's Office appear to be "multiple means constituting a single and continuing offense" referred to above. The answers that are alleged to be false were given in response to only four or five principal questions, and all the questions deal with Buettner-Janusch's conversations with three individuals. A false answer regarding one of the questions would contemplate in the name of consistency additional false answers in response to similar questions. The statute, by its terms, 18 U.S.C. §1001, contemplates the making of false statements. This wording justifies the inference that a series of false statements concerning a single fact or event would constitute a single crime. I conclude that Count Six is not duplicitous, and there is no need to separate the false statements. At trial the jury

will be instructed on request that in order to convict they must be unanimous as to the wilful falsity of at least one of the claimed statements and all must agree as to the same statement.

Defendant's Motion to Suppress Tape Recordings.

Defendant also moves, pursuant to Rule 12(b)(3), F.R.Crim.P., to suppress seven tape recordings. These tapes include five conversations between Richard Macris and Buettner-Janusch, dated May 23, June 1, 5 and 8, 1979, and two conversations between Cornyetz and Buettner-Janusch dated June 27 and July 2, 1979. Apparently, defendant does not challenge the two tapes, recorded by Jolly, dated May 20 and June 10, 1979, of conversations between himself and Buettner-Janusch. In addition, the Government asserts that it does not intend to offer at trial on its main case, the tapes made by Lisa Forman of conversations with Buettner-Janusch.

There are several arguments raised by defendant in support of his motion to suppress. First, defendant claims that surreptitious tape recordings of his conversations by persons who were, "in effect," Government agents amounted to interrogation in the absence of counsel in violation of the Sixth Amendment. The Government replies, quite correctly, that defendant's Sixth Amendment right to counsel does not attach until the "initiation of adversary criminal proceedings [against the defendant] - whether by way of formal charges, preliminary hearing, indictment, information, or arraignment." Kirby v. Illinois, 406 U.S. 682, 689 (1972). Accord, Brewer v. Williams, 430 U.S. 387 (1974). Because the tape recordings were made in this case before the initiation of any adversary criminal proceedings, the presence or waiver of counsel during those

recordings was not required by the Sixth Amendment. The first contention of defendant must be rejected. See, Massiah v. United States, 377 U.S. 201 (1964); United States v. Knohl, 379 F.2d 427 (2d Cir.), cert. denied 389 U.S. 973 (1967).

Defendant's second argument in favor of suppression attempts to circumvent the Kirby rule set forth above by claiming a violation of defendant's Fifth Amendment rights. His argument appears to be as follows: The Government knew on May 22, 1979 that defendant was represented by counsel, because he appeared at the Grand Jury proceedings on that day accompanied by an attorney. Although no adversary criminal proceedings had been initiated against him at that time, defendant contends that once an attorney entered the situation with respect to Buettner-Janusch, the Government could not interrogate him

either directly or indirectly. Thus, the Government's use of agents to interrogate Buettner-Janusch, by secretly taping conversations with him, without an attorney present, is claimed to violate defendant's right against self-incrimination. See United States v. Wedra, 343 F.Supp. 1183 (S.D.N.Y. 1972); People v. Arthur, 22 N.Y. 2d 325, 292 N.Y.S.2d 661 (1968).

The Government counters this claim with two arguments. First, the prosecution contends that its knowledge that a target had obtained counsel does not afford him thereafter with a special privilege to have counsel present at all conversations with undercover Government agents, prior in time to initiation of adversary criminal proceedings. Further, the Government alleges that the Fifth Amendment right against self-incrimination is inapplicable here, as the conversations were not

"custodial interrogations" containing elements of potential coercion or compulsion.

I conclude that the Government's taping of conversations between Buettner-Janusch, Macris and Cornyetz, without defendant's lawyer present, was not a violation of Buettner-Janusch's right against self-incrimination. At the time these tapes were made, defendant was not in custody, Escobedo v. Illinois, 378 U.S. 478 (1964), and there is no evidence of coercion on the part of the Government in obtaining the statements. Hoffa v. United States, 385 U.S. 293 (1966). Without any indicia that the statements by defendant were compelled, there is no need to hold that the presence of counsel was necessary to protect defendant's right against self-incrimination. See, Hoffa v. United States, supra; United States v. Craig, 573 F.2d 455, n.14 (7th Cir. 1977), cert. denied 439 U.S. 820 (1978); United States

v. Lemonakis, 485 F.2d 941, 954, n.20 (D.C. Cir. 1973), cert. denied, 415 U.S. 989 (1974). United States v. Wedra, supra, relied on by defendant, is distinguishable because the defendant in that case had been indicted, arrested and was in custody when he was interrogated without his attorney, the police knowing that he was represented by counsel. The potential for coercion or unfairness in such a case is far greater than in the one at bar.

The third argument advanced by defendant in support of suppression of the tapes is that the Government's actions violated the ABA Code of Professional Responsibility. Specifically, defendant alleges that the tape recording of Buettner-Janusch's conversations was, in effect, an interrogation of defendant by agents of the attorneys for the prosecution

without the presence or consent of defendant's attorney, who has known to have been retained with respect to the matter. Disciplinary Rule 7-104(A)(1), states:

> "During the course of his representation of a client a lawyer shall not:
>
> Communicate or cause another to communicate on the subject of the representation with a party he knows to be represented by a lawyer in that matter unless he has the prior consent of the lawyer representing such other party or is authorized by law to do so."

The cases cited by defendant, see, e.g., United States v. Thomas, 474 F.2d 110 (10th Cir.), cert. denied, 412 U.S. 932 (1973); United States v. Wedra, supra, involved actual custodial interrogation by prosecution attorneys after an arrest. The scenario involved in this case is more like the facts in United States v. Lemonakis, supra, relied on by the Government. In Lemonakis, the

Court of Appeals for the District of Columbia held that the communication proscribed by Discoplinary Rule 7-104(A)(1) does not include the "initiation and recording of conversations" between a Government informant and a defendant. Id., at 955. Accordingly, I conclude that the prosecuting attorneys in this case did not violate Canon 7 of the ABA Code of Professional Responsibility, and if they did, it should not provide a basis for terminating a criminal prosecution on grounds unrelated to guilt or innocence.

Defendant's fourth contention is that because he reasonably believed a joint defense was being conducted, which included co-conspirators Richard Macris and Cornyetz, his statements to them summarizing legal advice he had received should be protected by the attorney-client privilege. However, "it is vital to the claim of privilege that

the communications between client and attorney were made in confidence and have been maintained in confidence." In re Horowitz, 482 F.2d 72, 81-82 (2d Cir.), cert. denied, 414 U.S. 867 (1973). I find that Buettner-Jansuch waived the attorney-client privilege when he disclosed such otherwise privileged communications to Macris and Cornyetz. The fact that a joint defense was contemplated is of no consequence.

A similar claim is raised by defendant regarding the Government's interference with his attorney-client relationship. Defendant contends that the prosecution "sent a spy into the defense camp" by including or allowing Macris and Cornyetz to tape conversations with Buettner-Janusch, which included some discussion of defenses and strategy, and thereby deprived defendant of his Sixth Amendment right to counsel.

In United States v. Dien, 609 F.2d 1038 (2d Cir. 1979), the Court of Appeals for the Second Circuit stated:

> "In Weatherford v. Bursey, [429 U.S. 545 (1977)] the Supreme Court held that to establish a Sixth Amendment violation where an informant sat in on defense strategy sessions defendants were required to establish that privileged information had been passed to the government or that the government had intentionally invaded the attorney-client relationship, and resulting prejudice."

Id., at p. 1043. Because defendant in the instant case is claiming that Macris and Cornyetz were participants in the defense strategy and privy to confidential information, he must meet the standard set forth in Weatherford and Dien. This he has failed to do. The information given by Buettner-Janusch in the taped conversations was certainly passed along to the Government, but there is no credible evidence to show

that the Government intentionally invaded the attorney-client relationship. The conversations recorded were not between Buettner-Janusch and his attorney, but between Buettner-Janusch and his students and alleged former co-conspirators. It seems clear that the purpose of recording defendant's statements was not to discover trial strategy, but rather to aid in the investigation. Defendant has demonstrated no prejudice, as the comments by Buettner-Janusch concerning his attorney's advice were very general, trite and insignificant.[5/] Therefore, I conclude that defendant was not deprived of his Sixth Amendment right to counsel when the information on the tapes was passed on to the Government.

Finally, defendant claims that the Government should have obtained a warrant to tape these conversations, because the consent by Macris and Cornyetz, which would

permit secret recordings under 18 U.S.C. §2511(2)(c) was coerced by the Government. The Government must prove that such consent was given, but this standard of proof is far less stringent than that required to show consent to a physical search. United States v. Bonanno, 487 F.2d 654 (2d Cir. 1973). In this case, the Government has met the necessary standard, and defendant's claim on this point must be denied. See, United States v. Fuentes, 563 F.2d 527 (2d Cir.), cert. denied, 434 U.S. 959 (1977).

Defendant's Motion to Suppress Physical Evidence

Defendant's final motion, pursuant to Rules 12(b)(3) and 41(e)(1), F.R.Crim.P., seeks to suppress all the evidence seized (1) from the new laboratory during the search on May 17, 1979; (2) from the basement storage room during the search on August 2, 1979; (3) by Professor Jolly from the old

and new laboratories prior to May 17, 1979; and (4) any photographs taken in the laboratories by Jolly prior to the night of May 17, 1979. Because the first two searches and seizures raise similar issues, they will be considered together, and the search and seizure by Jolly will be considered last.

The Search of the Laboratory and Storage Room

Defendant's argument that the warrantless searches of the new lab and the storage room were unconstitutional is as follows: He contends that he had a reasonable expectation of privacy in both areas, and that the Fourth Amendment proscription against unreasonable searches applies in this case. He further contends that warrantless searches of the new lab and storeroom are prima facie invalid, and that the Government must prove an exception to the warrant requirement and exigent circumstances in

order to justify its search of these protected areas. Defendant claims that the Government has filed to prove either an exception or exigent circumstances, and that the Government's searches must be declared unlawful, and the evidence seized must be suppressed.

The Government has not argued that Buettner-Janusch had no reasonable expectation of privacy in his laboratory and storage room, although the Court regards the situation of the laboratory as differing from that of the storage room. The Government relies on third party consent to the searches, given by the President and General Counsel of NYU, and also by Richard Macris and/or Professor Jolly.

The Supreme Court has stated many times that, under the Fourth Amendment to

the United States Constitution, a search by the Government without a properly issued search warrant is "per se unreasonable ... subject only to a few specifically established and well delineated exceptions." Katz v. United States, 389 U.S. 347, 357 (1967); see, e.g., Schneckloth v. Bustamonte, 412 U.S. 218 (1973); Coolidge v. New Hampshire, 403 U.S. 443 (1971). A well recognized exception to this requirement of a properly issued warrant is a search conducted pursuant to consent. Schneckloth v. Bustamonte, supra, at 219. But "[w]hen a prosecutor seeks to rely upon consent to justify the lawfulness of a search, he has the burden of proving that consent was, in fact, freely and voluntarily given." Bumper v. North Carolina, 391 U.S. 543, 548 (1968); United States v. Bracer, 342 F.2d 522 (2d Cir.), cert. denied, 382 U.S. 954 (1965).

Defendant argues that the prosecution has the burden of proving not only consent, but exigent circumstances as well, in order to validate the searches at issue here. In support of this theory, defendant relies on Supreme Court's language that "a warrantless search must be strictly circumscribed by the exigencies which justify its initiation." Mincey v. Arizona, 437 U.S. 385, 393 (1978), citing Terry v. Ohio, 392 U.S. 1 (1968). Defendant concludes that because the Government knew of the unlawful substances in the new lab and the storage room long before the searches actually took place, and because there was no immediate threat that the evidence might be destroyed or removed, there was no reason for the warrant requirement to be disregarded in this case. I do not agree. Although exigent circumstances must be present to justify

certain warrantless searches, see e.g., Arkansas v. Sanders, 99 S.Ct. 2586 (1979); Coolidge v. New Hampshire, supra, any mention of exigency is noticeably absent from the recent Supreme Court decisions concerning consent searches. See, United States v. Matlock, 415 U.S. 164 (1974); Schneckloth v. Bustamonte, 412 U.S. 218 (1973); Frazier v. Cupp, 394 U.S. 731 (1969). Therefore, I conclude that the prosecution need only prove consent, and not exigent circumstances, to justify the two searches in dispute here. See, Ringel, Searches and Seizures, Arrests and Convictions, § 9.1 (2d Ed. 1979).

In order to determine whether valid consent was given in this case, a brief review of the legal principles involved is necessary. Our discussion begins with United States v. Matlock, 415 U.S. 164

(1974). In Matlock, the Supreme Court held that a person other than the defendant could consent to a search of an area in which the defendant had a reasonable expectation of privacy, and that this consent would validate a search without a warrant. However, for such "third party consent", to be effective, the prosecution must show

> "that permission to search was obtained from a third party who possessed common authority over or other sufficient relationship to the premises or effects sought to be inspected."

In footnote 7, the Court defined common authority:

> "Common authority is, of course, not to be implied from the mere property interest a third party has in the property. The authority which justifies the third-party consent does not rest upon the law of property, with its attendant historical and legal refinements, see Chapman v. United States, 365 U.S. 610 (1961)(landlord

> could not validly consent to the search of a house he had rented to another), Stoner v. California, 376 U.S. 483 (1964)(night hotel clerk could not validly consent to search of customer's room) but rests rather on mutual use of the property by persons generally having joint access or control for most purposes, so that it is reasonable to recognize that any of the co-inhabitants has the right to permit the inspection in his own right and that the others have assumed the risk that one of their number might permit the common area to be searched."

The Supreme Court's foundation for this rule is not that the third party is able to waive the defendant's Fourth Amendment rights. Rather, this principle developed by the Supreme Court recognizes that the third party could permit the warrantless search of the premises or effects sought to be inspected in his own right, and the defendant is thought to have assumed the risk that this third

party might permit such a search. See, LaFave, Search and Seizure; A Treatise on the Fourth Amendment, § 8.3 (1978); Wefing and Miles, Consent Searches and the Fourth Amendment: Voluntariness and Third Party Problem, 5 Seton Hall L. Rev. 211 (1974).

Our Court of Appeals has interpreted this holding in Matlock in several cases, and the "clearly established rule" is that

> "consent to a search by one with access to the area searched, and either common authority over it, a substantial interest in it or permission to exercise that access, express or implied, alone validates the search."

United States v. Gradowski, 502 F.2d 563, 564 (2d Cir. 1974); United States v. Pravato, 505 F.2d 703 (2d Cir. 1974); United States v. Jenkins, 496 F.2d 57 (2d Cir. 1974), cert. denied, 420 U.S. 925 (1975).

Defendant contends at length that the test developed by the Second Circuit is far to broad, and not in accordance with Matlock. Presumably, the defense regards "express or implied permission" to enjoy access as an extension of the definition of "common authority" provided in footnote 7 of Matlock. However, this argument carries no weight at the trial court level. The mischief caused by the exclusionary rule justifies this Court in strict adherence to decided Second Circuit cases on the subject.

I conclude that the Government need only prove by a preponderance of the credible evidence that the President of NYU directly or through his subordinates, or Richard Macris, or Professor Jolly (1) has access to the new lab and the storage room; and (2) also had common authority over the areas, a substantial interest

in them, or express or implied permission to exercise the access, and allow others to do so. For the sake of clarity, we will discuss this test first with respect to the new lab, and thereafter consider access to the storage room in the basement.

Although I reject for obvious reasons the Government's theory that the privilege or ability of NYU as owner to break down its own door to the new lab constituted access, I find on the basis of the evidence adduced at the hearing that NYU officials did have access to the new lab, a fact which must have been known to defendant.[6/]

Both the Director of Maintenance at NYU and the Building Manager testified, and I find that to the best of their knowledge, they had keys to the new lab on May 17th. There was also testimony that it was NYU's policy to have keys to all NYU facilities, including the new lab.[7/] The possession

of these keys certainly constitutes access under the Second Circuit's test. See United States v. Gradowski, supra; United States v. Gargiso, 456 F.2d 584 (2d Cir. 1972). It is clear that the freight elevator opened into the labs without the necessity of any key except that needed to operate the car. This elevator served the entire building for freight. It carried an operator, and such additional persons necessary to accompany and handle freight. When the automated passenger elevators were not operating, it also carried passengers. Through his non-academic subordinates President Sawhill had control of the freight elevator, and access thereto, and to all areas opening therefrom without other doors or closures. This includes the new lab.

Defendant claims that the locks on the fourth floor were in fact changed in

November and December 1975 in response to unrelated thefts of property from the labs, and that the "administration" was never given a copy of the new keys. In support of this argument, the defense has submitted reports issued by the NYU Department of Protection, which indicate that the security officers patrolling Rufus Smith Hall were unable to obtain a key to certain doors in that building on three occasions. (Ex. W). However, these reports carry little weight, as the first two are dated before the locks allegedly were changed, and the third report shows merely that the guards did not have a key to room 401 which is an office at the opposite end of the hall from the laboratory door.

Defendant also argues that certain memoranda from Vice President John O'Mara (Ex. 15) suggest that NYU did not have keys

to all the rooms at NYU, and that NYU's "policy" was not always enforced. However, the areas referred to in these memoranda do not include the new lab. Finally, defendant contends that the testimony and a letter dated July 26, 1979 (Ex. 16) from Gene Coe, the Assistant Building Manager, also indicates that NYU did not have keys to the locks in Rufus Smith Hall, which housed the new lab, in late July, 1979. Again, this evidence does not prove that NYU did not have the keys on May 17th, as it asserts.

Even if we assume that NYU did not have the keys to the new lab, it always had access to the new lab through the old lab, connected by a doorway having no door, and in turn entered by means of the freight elevator. This elevator was utilized by the NYU maintenance and security forces.

As noted above, this elevator also was occasionally used as a passenger elevator. Accordingly, I find that the NYU officials who gave consent for the search of the new lab had access to that lab through the freight elevator.

The next issue, after finding access, is whether NYU President John Sawhill and General Counsel Andrew Schaffer had common authority over the new lab, a substantial interest therein, or express or implied permission to exercise their access into the lab. The Government contends that NYU had common authority over, and a substantial interest in, the new lab because the University owned the premises, assigned space therein to faculty members, and had an interest in protecting the students from any dangerous activity in the laboratory. The Government also claims

that NYU permitted Buettner-Janusch to use the premises on the implied condition that he allow the University unrestricted access, and thus there was permission to enter the new lab.

The fact that NYU owned the building housing the new lab, with certain rights and duties therein, does not amount to common authority under footnote 7 of Matlock. There, the Supreme Court stated that "[t]he authority which justifies the third-party consent does not rest on the law of property, with its attendant historical and legal refinements." United States v. Matlock, supra, at 171 n.7, citing Chapman v. United States, 376 U.S. 610 (1961)(landlord lacked power to consent to the search of a house he had rented to another). In this case, the laboratory was built especially for Buettner-Janusch's

professional activities and assigned to him. There was no "mutual use" of the property by any non-academic NYU officials or personnel. The cleaning staff was allowed to enter only by appointment, and the fact that maintenance and security forces were allowed to enter for specifically defined duties does not demonstrate mutual use. See Stoner v. California, 376 U.S. 483 (1964).

The Government also produced several University regulations that purported to show NYU's common authority over, or a substantial interest in, all premises including the new lab. (Ex. 1). It seems clear that accepting faculty tenure subject to these regulations cannot be construed as a waiver by defendant of his Fourth Amendment rights. However, the principle of third-party consent is not based on waiver. There is recognized authority

to the effect that while a university has the right to enter a room assigned to a student in furtherance of educational objectives or in case of emergencies, this right does not extend, by means of such university regulations, to warrantless searches for evidence of a crime. See, e.g., Piazzola v. Watkins, 442 F.2d 284 (5th Cir. 1971); Smyth v. Lubbers, 398 F.Supp. 777 (W.D. Mich. 1975).

Finally, the Goverment raises the argument that Buettner-Janusch gave the University express or implied permission to exercise access into the lab. There was no proof that Buettner-Janusch took occupancy under an express condition reserving to the University administrative authorities the right to exercise any possessory authority or access with respect to the new lab. They were not exercising

such access on any regular basis. That they would have done os in event of fire, flood or other emergency is of no relevance. The landlord of a rented apartment would do no less.

Therefore, I conclude that NYU had access, but did not have common authority over the new lab, a substantial interest therein, or permission to exercise that access into the lab.

The Government's second contention was that Richard Macris, Buettner-Janusch's lab assistant and NYU student, had access, common authority, and express or implied permission. Macris clerly had access to the new lab for the first six months of 1979, as he had keys to the door with the knowledge of Buettner-Janusch. See, United States v. Cradowski, supra. Also, the fact that he was an employee of NYU

in the lab does not necessarily preclude a finding of common authority. United States v. Murphy, 506 F/2d 529 (9th Cir. 1974), cert. denied, 420 U.S. 996 (.975); United States v. Sells, 496 F.2d 912 (7th Cir. 1974). However, defendant contends that because Macris did not receive wages for his work in the lab after December, 1978, and his personnel record shows termination on that date, he cannot be considered an employee on May 17, 1979. Also, Macris concedes that he stopped reporting to the lab on April 20, 1979 under a feigned claim of illness, and did not return until sometime in June, when he began working as an assistant to Jolly. Defendant asserts that the logical conclusion to be drawn from this evidence is that Macris did not have "mutual use," and thus common authority, over the new lab on May 17, 1979.

The Government offered some evidence at the hearing that Macris was still an employee for the first six months of 1979 because he received tuition remission for his owrk in the lab, and because Buettner-Janusch told Macris in February, 1979 that he would resume receiving wages for his work in the lab retroactively, as soon as some budgetary problems were resolved. In addition, the Government contends that while Macris stopped coming to work on after April 20, 1979, Buettner-Janusch told him to return whenever he "recovered" from his feigned illness, and fully expected him to return.

I conclude from this evidence that Richard Macris was so employed in the lab with defendant's knowledge and had common authority over the new lab on May 17, 1979, the date of the search. Paraphrasing the

Matlock test set forth in footnote 7, I find that it is reasonable to recognize that Macris had the right to permit inspection of the new lab in his own right and that defendant assumed the risk that Macris might permit the common area to be searched. Even though Macris was not then receiving wages for his work in the new lab, it seems clear that he was told that funds would be forthcoming, and he continued to work for the University under Buettner-Janusch in the new lab until April. Although Macris was absent for approximately four weeks before the search, this was considered by defendant to be a temporary leave, as Macris had been invited to returned when he recovered.

Even if common authority were not present, I find that Macris had express or implied authority to exercise his access

to the lab, and thus could have consented to a search in any event. Although Macris stopped coming to the lab on April 20, 1979, he was told by defendant that he should return whenever his "health" permitted, and this surely gave permission to enter the new lab at any time in the future.

Defendant further argues that Macris did not actually give consent to the search, but only went along on May 17th because he was asked to do so by the Government. I find that Macris' conduct implied consent even though the precise words of authorization may not have been spoken. See, United States v. Candella, 469 F.2d 173 (2d Cir. 1973). In sum, I find that Macris' consent is an independently valid basis for the May 17th search.

The Government also claims that Jolly had common authority over the new lab, or at least express permission to use that laboratory, and that he too gave valid consent to the search. It is certainly true that Jolly had access to the new lab, since he had keys to the door at all times. On the issue of common authority or permission, the prosecution offered an unsigned memorandum to Dean Stuart of NYU which spoke of the floor plans for the new lab and stated that Jolly could use the new facilities as well (Ex. 4). I have no doubt that this memo was written contemporaneously with the new construction by Buettner-Janusch, and infer from it that defendant permitted Jolly to share his laboratory facilities. Also, there was testimony at the hearing that Jolly did use Buettner-Janusch's lab on occasion,

and that defendant never objected to this. It is hard to imagine that such an objection would be raised, because the two labs were adjacent to each other, connected by an open doorway, and defendant's lab contained facilities not available to Jolly in the old lab. Therefore, I find that even if Jolly's use of the new lab did not rise to the level of common authority, he certainly had permission, express or implied, to enter the new lab and use the facilities therein. I also conclude that Jolly's offer to accompany the Government on the May 17th search, and his actions that evening such as opening the doors for the agents, constituted consent. United States v. Candella, supra. It provides a valid independent basis for the May 17th search.

Accordingly, the Government has proved that there was valid consent to the May 17, 1979 search of the new lab, and that no search warrant was required to comply with the Fourth Amendment.

Defendant also contends that the Government's warrantless search of the new lab violated his First Amendment right to engage in research. Specifically, defendant argues that his research is a form of expression protected by the First Amendment ("academic freedom") and that any search which infringes on First Amendment expression must satisfy a higher standard of "reasonableness" in order to comply with the Fourth Amendment. In support of this, defendant cites the case of Roaden v. Kentucky, 413 U.S. 496 (1973), which held that a warrantless seizure of an obscene film to be shown in a commercial theater, although incident to an arrest,

was unreasonable because of the First Amendment proscription against prior restraint. However, the Roaden case also states that "[a] seizure reasonable as to one type of material in one setting may be unreasonable in a different setting or with respect to another kind of material .... The seizure of instruments of a crime, such as ... 'contraband ...' are to be distinguished from quantities of books and movie films when a court appraises the reasonableness of the seizure under Fourth ... Amendment standards." Id., at 501-502. Therefore, the Roaden case is clearly distinguishable from the case at bar. Even if we assume that the manufacture of controlled substances in the context of a teaching facility in the field of scientific research is a form of expression protected by the First Amendment or privileged under con-

cepts of academic freedom, the Government's search for such substances is not subject to a higher standard of reasonableness. Because this Court concludes that valid consent was given for the search of the lab, the search was reasonable and did not infringe on any of defendant's First Amendment rights.

Before we consider the validity of the seizure of evidence from the lab, we now turn to the validity of the search of the basement storage area on August 2, 1979.

The Government contends that the NYU administration, Richard Macris and Professor Jolly all had access to this storage room, as well as common authority over it and permission to exercise their access. A careful review of the evidence finds this argument unsupported by the facts.

President Sawhill and General Counsel Schaffer had no access to the basement storage room on August 2, 1979. It is undisputed that Buettner-Janusch had Professor Cantwell change the lock on the door to this room on July 19, 1979 and the two new keys resulting from her efforts and paid for by the University, were not turned over to the NYU administration, or to anyone else. The only way to gain entry into the storeroom without a key would be to break down the door or to push over the bookshelves that closed a gap in one wall of the room. These bookshelves went from the floor to the ceiling, and were filled with books. A fair reading of the relevant cases on consent searches leads to the conclusion that "access" must be ready and lawful, and not by force. See, Chapman v. United

States, 365 U.S. 610 (1961); United States v. Gradowski, supra. A similar conclusion may be reached with regard to Macris.

Jolly obtained his key surreptitiously, and this may constitute access under the test set forth in the Second Circuit cases cited supra. Nevertheless, I conclude that neither Jolly, nor for that matter NYU officials, or Richard Macris, had common authority over, a substantial interest in, nor permission to use, the storage room. Buettner-Janusch specifically told Ms. Cantwell to change the locks and to withhold the keys from everyone but himself. She elected to follow these orders. This clearly implies an intent to keep the room private from all outsiders, including the owner of the building. There can be no finding that defendant "assumed the risk" that an outsider would permit a search of this room. Further, the changing of the

locks and secreting of the keys implies that any prior permission to use the storage room was thereby revoked. There is no showing that NYU had keys prior to Ms. Cantwell's activity.

For these reasons, the search of the storage room on August 2nd was not conducted pursuant to valid third party consent. Because the Government relied on no other expectations to the warrant requirement, the Government's entry into the storeroom was an unreasonable search under the Fourth Amendment, Katz v. United States, supra; Coolidge v. New Hampshire, supra, and the evidence seized as a result of that search must be suppressed.

The Seizure in the New Lab

Thusfar, we have considered only the lawfulness of the two warrantless searches. Defendant also contends that,

assuming the search of the new lab was lawful by reason of third party consent, the seizure of certain items in the new lab violated his Fourth Amendment rights.

The evidence seized from the new lab was located in two general ares. First, there were chemicals and other items including the lab notebook lying out on lab benches. In addition, there were various substances located in enclosed areas such as the cold room, the freezer, the fume hood, and the cabinets beneath the fume hood.

The Government contends that no warrant was required to seize the evidence lying out on the lab benches because this evidence was in "plain view", and thus within a well-delineated exception to the warrant requirement. See, Harris v. United States, 390 U.S. 234 (1968); United States

v. Diaz, 577 F.2d 821 (2d Cir. 1978); United States v. Block, 590 F.2d 535, fn. 5 (4th Cir. 1978). On the other hand, defendant claims that the plain view doctrine only applies to "inadvertent discoveries" of evidence during an otherwise lawful search, Coolidge v. New Hampshire, supra, and that the DEA agents in the new lab were deliberately looking for the evidence that they found on the lab benches.

The requirement of "inadvertence" in plain view cases concerning contraband has recently been questioned in this Circuit, United States v. Liberti, Dkt. No. 79-1127 (2d Cir. January 25, 1980), and may not be necessary element of the Government's proof. Even if inadvertent discovery is required in some cases, no third party consent decision has imposed such a rule. See, United States v.

Gradowski, supra. Therefore, I conclude that evidence in plain view may be seized without a warrant if valid third party consent is given, regardless of whether the seizure was inadvertent.

Defendant also contends that the evidence seized from inside the fume hood, the cabinets beneath the fume hood, the cold room and the freezer should be suppressed, on the grounds that consent to search the lab does not authorize searches in enclosed areas. This argument has support in two Fourth Circuit cases. United States v. Block, 590 F.2d 535 (4th Cir. 1978); Reeves v. Warden, 346 F.2d 915 (4th Cir. 1965). However, there are also decisions to the contrary, United States v. Richardson, 562 F.2d 476 (7th Cir. 1977), cert. denied, 434 U.S. 1072 (1978); United States v. Robinson, 479

F.2d 300 (7th Cir. 1973); White v. United States, 444 F.2d 724 (10th Cir. 1971); and United States v. Matlock, supra, seems to reject the Fourth Circuit analysis by holding that third party consent to search a bedroom extends to the contents of a bag within a closet.

This question has been raised in two Second Circuit cases, United States v. Isom, 588 F.2d 858 (2d Cir. 1978) and United States v. Pravato, supra. In Isom, the Court of Appeals upheld a search, based on third party consent, of a locked metal box, because the defendant never asserted ownership of the box and thus had no interest under the Fourth Amendment in keeping the contents of the box private. The Court went on to state:

> "Guests [such as the defendant] have a justifiable expectation under Katz v. United States, 389 U.S. 347, 83 S.Ct. 507, 19 L.Ed.2d 576 (1967), that the

> contents of locked articles that they bring to the host's premises will remain private. This justifiable expectation should not be vitiated by a strained application of the third-party consent doctrine; the consent of the host should ordinarily be insufficient to justify a warrantless search when it is obvious that the searched item is the exclusive property of the guest. If the police wish to search such an article, then under Chadwick [v. United States, 433 U.S. 1(1977)] they may seize it upon probable cause, which they surely had here once the sawed-off shotgun was discovered in the pillow; they may then search the box after they have obtained a warrant." [Matter in brackets added].

The principle of United States v. Chadwick, supra, has recently been reiterated by the Supreme Court in Arkansas v. Sanders, 99 S.Ct. 2586 (1979), and by the Second Circuit in United States v. Dien, 609 F.2d 1038 (2d Cir. 1979),

amplified on rehearing, January 31, 1980. Therefore, the issue before this Court is whether defendant had a reasonable expectation that the fume hood, the cabinets underneath, the cold room and the freezer, were areas where his contrabnad possessions would remain private.

I conclude that these enclosed areas were not places in which Buettner-Janusch had a reasonable expectation of privacy. Richard Macris, Professor Jolly and a number of students had express or implied permission to use the cold room, the freezer, the fume hood and the cabinets, and exercised access to all of these areas. None of the enclosed areas were locked, or placed off-limits to others by defendant. Because of this access, and permission to exercise such access, existing in favor of of persons other than defendant, this case

is distinguishable as to the items in the enclosed areas, from those decisions concerning locked metal boxes, United States v. Isom, supra, sealed cardboard boxes, United States v. Dien, supra, and locked footlockers, Arkansas v. Sanders, supra. By allowing such a substantial number of persons to enter, use and observe these enclosed areas of the new lab as they wished, Buettner-Janusch forfeited any reasonable expectation of privacy that he might otherwise have had. Furthermore, the access to these enclosed areas by Jolly, Macris, and other students, and defendant's permission to exercise that access, supports a conclusion that Jolly and Macris validly consented to the search of these areas. In conclusion, the search and seizure of evidence from these enclosed areas was permitted by the third party consent to the search of the lab, and no search warrant was necessary.

An indeterminate number of the substances that were seized were located in tightly fastened opaque containers which did not, from their appearance or labelling, betray the nature of the contents. Defendant again relies on United States v. Dien, supra, and argues that while the seizure of such containers may have been proper, those containers should not have been opened until a warrant was obtained.

The facts in Dien are directly in point. In that case, narcotics dealers, followed by a DEA agent, were transporting their stock in trade through congested city traffic. The drugs were within plain cardboard boxes sealed with tape, placed within a van the windows of which had been painted over and in which opaque plywood had been placed behind the driver's seat, thereby manifesting an "expectation that the contents

would remain free from public examination" United States v. Dien, supra, at 1045. The Court of Appeals found that the warrantless search of the van and the seizure of the cartons was lawful, but that under its interpretation of the rationale of Arkansas v. Sanders, 99 S.Ct. 2586 (1979) a warrantless search of the cartons themselves was improper. Within that rule, as to any sealed opaque containers in the lab which do not show, by label or other obvious indicia that they contain relevant evidence, the opening and seizure of the contents was unlawful. Such items only will be suppressed.

Counsel are directed to meet forthwith and prepare an agreed schedule of the items meeting such criteria, and in event of inability to agree thereon, the Court will reopen the record to make more specific findings as to what is suppressed within

the rule of the Dien case. The Court has considered the Government's attempt by argument to narrow or distinguish the holding therein as limited to such items as briefcases, suitcases and footlockers which are the traditional means by which personal effects and papers are carried and stored. The words of the decision do not justify such a construction, so we must leave it for a higher authority to do so.

The Search and Seizure by Professor Jolly

Defendant also contends that the substances and photographs gathered by Jolly after April 25th, but before the May 17, 1979 search, should be suppressed. Defendant argues that after April 25th, when Edward Boyle took substances gathered by Jolly to the United States Attorney's Office for tests, the Government assumed

an active and indispensable role in the investigation, and that any further action on Jolly's part could not be considered "private" under the Fourth Amendment. On the other hand, the Government asserts that there is no proof of affirmative participation by federal agents until May 17th, and that the evidence gathered by Jolly prior to that date is therefore admissible as the produce of a private search.

The Fourth Amendment proscription against unreasonable searches and seizures applies only to activities of the sovereign, and not to those conducted independently by a private individual. Burdeau v. McDowell, 256 U.S. 456 (1921). In order for evidence gathered by a private individual to be suppressed, the search and seizure must be "infused with governmental

participation" United States v. Cangiano, 464 F.2d 320 (2d Cir. 1972). Expressed differently, there must be some affirmative participation or encouragement by the Government. See, United States v. Keuylian, 602 F.2d 1033 (2d Cir. 1979).

On the evidence before me, I find and conclude that the investigation conducted by Jolly was truly private, and not infused by government participation until the night of May 17, 1979. The Government did inspect certain substances gathered by Jolly, but on an anonymous basis and as a result of the voluntary intervention of intermediaries. Further, the Government did not encourage Jolly to conduct or continue his investigations in any way. I find that Jolly's actions were motivated not by Government participation or encouragement, but rather by understandable outrage that the facilities

of an institution of higher learning should be used by a colleague for the manufacture of alleged illegal drugs.

The motions are disposed of in accordance with the foregoing which constitutes findings and conclusions. Settle an order on five (5) days notice or waiver of notice, with schedules identifying with particularity the items suppressed.

A pre-trial conference and status report will be held before me on April 10, 1980 at 9:30 A.M. in Courtroom 307.

Dated: New York, New York
March 27, 1980

Charles L. Brieant
U.S.D.J.

F O O T N O T E S

1. Fried telephone Boyle to furnish the results of the DEA tests. Boyle testified that:

> "He [Fried] said to me and these are his exact words, 'I have good news and bad news.' He said, 'The good news is that your relative who is working the laboratory is one Hell of a chemist, [and] that this is the purest, strongest sample of the particular controlled substance that his agents had tested.' The bad news was implicit." (Tr. p. 240).

2. The Government offered no explanation at the hearing for its failure to obtain a search warrant in this case and thereby obviate any controversy. As counsel for defendant pointed out (Tr. pp. 43-45), if by proceeding on third-party consent the Government sought to protect the anonymity of Macris and Jolly, it could have satisfied this necessity by obtaining warrants on affidavits founded on anonymous informants. The legitimate interest of the University were served by urging the Government, as Schaffer apparently did, to go forward with the search on the basis of consent without a warrant. If the consent search turned up nothing, that would have been the end of the matter. But if a search warrant had issued, it would have required a return to be filed in the public files of the Court under Rule 41, F.R.Crim. P., with resulting notoriety injurious to the University.

3. There is no reason to suspect that Dr. Cantwell, who was also an Assistant Professor of Anthropology at Rutgers University, acted with improper motives when she performed this service for defendant. However, she conceded that her participation in such an activity was highly unusual. She testified:

"Q Is it an ordinary part of your duty as an honorary research fellow to supervise the changing of locks:

A No, it is not. These were, I was led to understand, extraordinary circumstances.

Q Who led you to understand that?

A Professor Buettner-Janusch.

Q What did he tell you.

A He called me and told me that he had, was aware that one of the graduate students, one of the lab assistants, Danny Cornyetz, had been involved in the manufacture of drugs. He was worried that he was being framed -- it was during the summer, I should point out, when very few people were around and he asked me if I would change the locks for him.

THE COURT: I've never known any professor who was asked to supervise repairs to materials and equipment." (Tr. pp. 447-450).

4. The difference between a conventional cylinder lock and a Medeco lock has been described as follows:

> "A conventional lock has a series of spring-loaded pins which are moved vertically by the insertion of the key. When the pins are each raised to the proper designed height, which variew between locks, the lock tumbler can be turned by turning the key, thereby unlocking or opening the bolt. In order to raise the pins to the proper position, the key for such a conventional lock is cut with a plurality of cuts, called bits, to predetermined depths corresponding to the desired vertical positions of each of the pins at which the lock will open. Moreover, the ends of the spring-loaded pins which are in contact with the key are rounded, to permit easy sliding of the key.
>
> The Medeco lock adds a new feature to the conventional cylinder lock above described. In addition to lifting each of the pins to an appropriate height for that pin, as in a

> conventional lock, insertion of the key also rotates the pins about their aces, to appropriate angular positions. This twisting or rotation to a predetermined point, approximately 20 degrees either to the left or right, is made possible by the angling of the bits on the key and the fact that the ends of the pins contacing the key are wedge-shaped, rather than rounded as in a conventional lock, so that they conform to the angle on the key. The thrusting in of the key both turns and lifts the pins. Both actions are necessary to turn the tumbler and unlock the lock. The key is wider than the usual key, at the point which bears on the wedge-shaped lower ends of the pins." Medeco Security Locks, Inc. v. Lock Technology Corp., Dkt. No. 75 Civ. 963 (S.D.N.Y. December 37, 1976).

To duplicate a Medeco key, a locksmith must possess special patented key-cutting equipment, and also must have the serial or pattern number of the original key to the lock. As a result of these safeguards, it is virtually impossible for a criminal or a locksmith to "pick" or otherwise open, a Medeco lock without special patented equipment available only under license, and the pattern or serial number of the specific key to that lock.

5. For example, in the June 1, 1979 conversation between defendant and Richard Macris, defendant quoted his then attorneys as saying that they would not permit defendant to testify before the Grand Jury, and if he were subpoenaed, that he should assert his Fifth Amendment rights. Defendant also stated that his then attorneys had assured him that neither Macris nor Cornyetz would be made a target of the investigation and that his attorneys could beat any charges against Buettner-Janusch on his reputation alone. For this and more of the same, Buettner-Janusch disclosed that he was paying a $40,000 legal fee for all services prior to indictment. In the same conversation, while speculating on who the "informant" in the case might be, defendant disclosed that his then attorneys could usually get information such as this "leaked out" of the U.S. Attorney's Office, but had not been able to do so in this case.

In the June 27 and July 2, 1979 conversations between defendant and Danny Cornyetz, defendant divulged the hardly significant facts that his then attorneys "think Bruce [Greenfield] is slightly ga-ga," and believe that they could "massacre" Richard Macris if he testified against them.

By quoting defendant's disclosures of "trial strategy" we draw no inference as to whether such advice was in fact given, or whether it was quoted correctly by Buettner-Janusch on the tapes. We note only that a thorough review of the tapes shows he never disclosed any significant legal advice given to him by his then attorneys.

6. In addition to defendant, Professor Jolly and Richard Macris, a number of others had keys to the new lab. Richard Macris testified that, to his knowledge, Danny Cornyetz, Lon Alterman, Patricia Caratsis, Bruce Greenfield, Rhea Trienkis and Lisa Forman had keys (Tr. p. 89). Also, in a taped converstaion between defendant and Macris on June 1, 1979, the following exchange took place:

BUETTNER-JANUSCH:	If they were sure, I'd be indicted now.... You know what it is, it's an informer ... someone got picked up with something and said he got it from B-J's lab, someone took something from the lab and got caught, which is entirely possible....
MACRIS:	Yeah. You --
BUETTNER-JANUSCH:	You know how open, you know how careless we are with that --
MACRIS:	Yeah, that lab's always open.

This evidence strongly suggests that defendant was well aware of the large number of people who had access to the new lab, and that he had no reasonable expectation of privacy.

7. General Counsel Andrew Schaffer testified that:

> "The University policy was to maintain a copy of keys to all academic premises, and to have access to all academic premises at all times to assure the safety and health of the university and the safety of people who work there and the premises themselves." (Tr. p. 33).

Walter Murray, Director of Maintenance and Operations at NYU, confirmed in his testiminy that there was a policy at NYU requireing that the building manager and the engineers have "accessibility to each and every room in the University." (Tr. pp. 189-190). Murray further testified that if he discovered an NYU facility not complying with this policy, he would insist that the facility provide keys to NYU to maintain access. (Tr. p. 198). This was in accordance with memoranda from John O'Mara, Vice President for Institutional Facilities, which stated in part that "there cannot be places to which the building managers cannot have access in case of emergency." (GX 15). Despite all this, there were places in the University, including Buettner-Janusch's storage room, with respect to which the University policy was honored in the breach by high placed academics such as this defendant. I am convinced

that the University had actual or constructive notice that it had no key to the storage room and that its enforcement of the unwritten "policy" was, to say the least, half-hearted with respect to this defendant and those of similar standing.

APPENDIX C

OPINION OF JUDGE BRIEANT (Filed May 28, 1980)

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

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UNITED STATES OF AMERICA, :

-v- : 79 Cr. 710-CLB

JOHN BUETTNER-JANUSCH, : MEMORANDUM AND ORDER

Defendant. :

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Brieant, J.

In a memorandum decision and order dated March 27, 1980, this Court decided, inter alia, that the Government's warrantless search of defendant John Buettner-Janusch's laboratory at New York University, and the seizure of a number of items therein, was lawful and not in violation of the Fourth Amendment of the United States Constitution. However, the decision left open the question of whether several "tightly fastened opaque containers" and

their contents which were seized from defendant's lab and searched by the Government without a warrant, should be suppressed under the rule of Arkansas v. Sanders, 99 S.Ct. 2586 (1979), and United States v. Dien, 609 F.2d 1038 (2d Cir. 1979). To resolve this problem, the record was reopened and a further evidentiary hearing was held on April 3, 1980. Defendant and the Government each submitted post-hearing memoranda, and the motion to suppress those containers was fully submitted on April 25, 1980. Familiarity with this Court's earlier decision of March 27, 1980 is assumed. The following constitutes my supplemental findings of fact and conclusions of law.

At the hearing on April 3, 1980, the Government produced the plastic containers in dispute, which were identified as

Exhibits 103, 104, 106 and 108 (formerly DEA Exhibits 3, 4, 6 and 8), and was observed carefully by the Court. All of these containers had tops that screwed on tightly. The contents were visible, in varying degrees, through the plastic walls of the containers. A direct observation of the containers differs from their generally more opaque appearance as shown in various photographs taken on the night of the raid and received in evidence at the prior hearing. While the exhibits themselves were available to the Court at the prior hearing, they remained inside evidence envelopes and were returned to Government custody at the end of the Court day. The photographs, however, were submitted to the Court and retained in Chambers for study at a later date when the matter was

submitted for decision. There is a surprising and substantial difference in the apparent opacity noted in observing the photographs, as contrasted with a direct visual observation of the containers themselves, now looked at again by the Court. The increased opacity found in the photographs is attributed to the effect of the flash bulbs used to take the pictures.

Exhibit 103 is two plastic containers found in the fume hood of defendant's laboratory, which allegedly contain methaqualone in variuos stages of refinement. On the side of one of the containers is an inverted V, shorthand for the word "approximately," and the writing "160 grams." On the side of the second container, there is an inverted V and the writing "330 grams." On the tops of both containers is a Roman

numeral II. The contents of these containers, as perceived visually through the plastic walls, may be described, and are readily apparent, as a granular white or cream colored substance.

Exhibit 104 is also two plastic containers, slightly smaller than those of Exhibit 103, which were taken from the same hood. Both containers have indications of quantity on the sides and writing on the tops. The contents, also alleged to be methaqualone in stages of purification, are visible through the plastic walls of these containers and may also be described as a white granular substance in one, and a darker, more crystalline substance in the other.

Exhibit 106 is one plastic container, allegedly containing methaqualone, which was seized from a bench in defendant's laboratory. On the side is a notation

"resin No. 1" and a Roman numeral I. Through the plastic, one may preceive the contents as a light colored powder.

Exhibit 108 is one plastic container, found in the lab freezer, having three glass containers and a gravel-like substance inside. On the side of the outer container is the notation "4BJ." Two of the glass containers inside have factory labels.

At the hearing, the Government also elicited the testimony of Jeffrey Weber, a supervisory chemist at the Drug Enforcement Agency, Northeast Regional Laboratory. Mr. Weber was present during the May 17, 1979 search of defendant's laboratory, and he advised the DEA agents in charge to seize, among other items, these concontainers. Mr. Weber testified that his advice was based on several facts and in-

ferences. First, his prior analysis of the samples collected by Professor Jolly from the lab revealed methaqualone and anthranilic acid, a direct chemical precursor to methaqualone in the customary process by which the latter is made. When he entered the laboratory on May 17, 1979, he saw a number of chemicals which were precursors to methaqualone, and he concluded from this information that the powders in nearby containers were probably methaqualone. These containers included Exhibits 103, 104 and 106. Also, Mr. Weber found a notebook in plain view in the laboratory next to Exhibit 106, that showed notations which corresponded to the writing on several of the containers, including the containers identified in Exhibits 103, 104 and 106. The notations also described the melting points of the contents of these containers, and Weber noticed that several of the

melting points corresponded closely with that of methaqualone. Mr. Weber conceded that he could not tell, simply from looking at the contents of these containers through their plastic walls, whether the substances were methaqualone or something else. But he could tell that it might be, and became convinced that these powders or substances were contraband and should be seized when he opened the tops to the containers and smelled toluene. Toluene is a known solvent regularly used in the manufacture of methaqualone. Mr. Weber also advised seizing Exhibit 108 after he saw that two of the glass bottles contained therein were labeled "ergotamine tartrate," a chemical precursor to lysergic acid diethylamide.

Defendant argues that the ineriminating nature of the contents of these plastic containers was not apparent from their outward appearance, and also that the "plain view"

doctrine is inapplicable in this case. Accordingly, defendant requests that Exhibits 103, 104, 106 and 108 be suppressed. On the other hand, the Government contends that the containers should not be suppressed because their contents were either in "plain view" or easily inferred by a trained chemist, Weber, from their outward appearance, other obvious indicia, and information known to the Government. In the alternative, the Government claims that the third party consent given by Professor Jolly and Richard Macris to search the laboratory extended to the seizure and search of the containers.

In Arkansas v. Sanders, 99 S.Ct. 2586 (1979), the Supreme Court stated that while personal luggage is inevitably associated with the expectation of privacy, and thus protected from warrantless searches absent exigent circumstances, "[n]ot all containers and packages found by the police during the

course of a search will deserve the full protection of the Fourth Amendment. Thus some containers ... by their very nature cannot support any reasonable expectation of privacy because their contents can be inferred from their outward appearance. Similarly, in some cases the contents of a package will be open to 'plain view,' thereby obviating the need for a warrant." Id. at 2593. n. 13.

Our Court of Appeals, purporting to follow this analysis in United States v. Dien, 609 F.2d 1038 (2d Cir. 1979), held that three large cardboard boxes, each partially sealed with tape, supported a reasonable expectation of privacy because the contents of these boxes were not in plain view, and the nature of the contents was not betrayed by the outward appearance of the cartons. The Court of Appeals rejected the Government's contention that the odor of marijuana, which emanated from the back

of the otherwise empty panel truck in which the boxes were found, revealed the contents of the boxes. A recent unreported case dealing with this problem, dated March 28, 1980, United States v. Mannino, 79 Cr. 744-RWS (S.D.N.Y.), held that there is no reasonable expectation of privacy as to an unsealed cardboard box which had interlocking flaps, which left a substantial apparent gap. That the box was otherwise covered by some rags or newspapers did not affect this conclusion, especially in light of the fact that the Government agents in the case had "ample cause" to believe that the cardboard box contained controlled substances.

Applying the analysis of Sanders and Dien to the instant case, I conclude that the plastic containers in Exhibits 103, 104 and 106 were properly opened, and their contents seized, without a warrant. However, the container identified as Exhibit 108 was unlawfully searched, and must be suppressed.

The testimony of the chemist, Weber, shows that the containers in Exhibits 103, 104 and 106 were seized and searched because their outward appearance betrayed the fact that they contained relevant evidence. The labeling on these containers closely corresponded to notations in defendant's lab notebook, and those notations indicated to Weber that defendant was experimenting with chemicals that had melting points close to that of methaqualone. Even if the substances in the containers at issue here were noted in the lab notebook as having higher melting points, these substances could still be relevant evidence such as precursors to methaqualone, or impure, partially refined methaqualone.

Moreover, assuming that the labeling does not disclose the nature of these containers' contents, one need only look at the containers themselves to realize that they are more transluscent than opaque. As noted earlier, our characterization of these plastic bottles as opaque

was unjustified. The photographs of the exhibits, taken with flash bulbs create the erroneous impression that the contents of the containers cannot be seen. In fact, the opposite is true; visual examination by the Court now establishes that each container here was sufficiently transparent to allow observation of the nature and appearance of the substances inside. Defendant contends that even if the containers are translucent, no chemist could discern what type of substance is inside merely by looking. However, it is unnecessary for the exact nature of the contents to be obvious to the beholder. The most expert chemist cannot identify a substance conclusively without testing it first. Thus, the containers in Exhibits 103, 104 and 106 were translucent to the point where the substances therein could be identified as white or slightly darker powder, and this appearance certainly betrayed them as relevant evidence in this case.

Although defendant may have expected the contents of these containers to be private, such an expectation would be unreasonable under the circumstances, and the protection of the Fourth Amendment shall not apply. See, Rakas v. Illinois, 439 U.S. 128, n. 12 (1978); Katz v. United States, 389 U.S. 347, 361 (1967) (Harlan, J., concurring); United States v. Ross, Dkt. No. 79-1624 (D.C. Cir. April 17, 1980).

The container marked as Exhibit 108 has no labels which would betray its contents as relevant evidence. It contains three glass bottles, two of which were labeled as chemicals which are precursors to LSD, but at the hearing, it was impossible to tell whether these labels could be read through the plastic walls of the main container. Mr. Weber testified that he opened the outer container before he attempted to see what was inside, and only then did he realize that the contents were relevant. Moreover, the container was found in the freezer, far away

from the other evidence of methaqualone. Mr. Weber had no reason to suspect, from his prior analysis of Jolly's samples, that lysergic acid diethylamide was being produced in the laboratory. For these reasons, I find that the substances within Exhibit 108 are not in plain view, nor are they betrayed by the outward appearance of the container itself, taken together with the other known facts.

The Government's alternative argument, that the third party consent of Macris and Jolly extended to the search of Exhibit 108, requires little discussion. In this Court's decision of March 27th, the rule of Sanders and Dien was applied in accordance with the analysis employed in United States v. Isom, 588 F.2d 858 (2d Cir. 1978), which involved the issue of whether third party consent extended to the search of a locked metal box. This analysis is controlling.

In conclusion, the containers in Exhibits 103, 104 and 106 were lawfully seized and searched, and will not be suppressed. However, Exhibit 108 must be suppressed for the reasons stated.

So Ordered.

Dated: New York, New York
May 27, 1980

Charles L. Brieant
U. S. D. J.

APPENDIX D

OPINION OF BRIEANT, J.

(Filed July 7, 1980)

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

UNITED STATES OF AMERICA,	79 Cr.710 -CLB
-v-	
JOHN BUETTNER-JANUSCH,	MEMORANDUM AND ORDER
Defendant.	

Brieant, J.

By motion docketed June 26, 1980, defendant John Buettner-Janusch moves for reargument, pursuant to Rule 9(m) of the Local Rules of this Court, of hsi prior motion for an order suppressing certain physical evidence obtained by the Government and held to be admissible at trial in this Court's decisions of March 27 and May 27, 1980. Reargument was heard on June 27, 1980. Familiarity with

this Court's Memoranda of March 27, May 27 and June 27, 1980 is assumed.1/

Defendant contends that the recent Supreme Court decision in Walter v. United States, 48 U.S.L.W. 4807 (June 20, 1980), requires that all physical evidence of controlled substances seized from the physical anthropology laboratory at New York University, whether taken initially by Government Agents or by Professor Jolly, a private party, must be suppressed.

After careful consideration of the Walter decision, and its applicability to the facts in the instant case, I adhere to my orders of March 27 and May 27, 1980, and decline to suppress the physical evidence referred to by defendant.

In Walter, a divided Supreme Court held that the Government's unauthorized screening of a number of obscene motion picture films owned by the petitioners constituted an unreasonable invasion of the petitioners' constitutionally protected interest in privacy, despite the fact that the Government had acquired the filsm from a private party. These films were each enclosed in individual boxes which displayed suggestive drawings and explicit descriptions of their contents. However, these individual boxes were contained, in turn, in twelve large plain cartons which were securely sealed, concealing the nature of their contents. The cartons were addressed to one of the petitioners' companies in Atlanta, Georgia, but were mistakenly delivered to another Atlanta company, where private party em-

ployees opened each of the cartons, and discovered the individual boxes and the descriptions and drawings thereon. The employees opened one or two of the individual boxes, but could not view any film sufficiently to determine its illicit character, merely by holding it up to the light. The opened cartons were turned over to the FBI, and thereafter several FBI agents viewed the films with a projector, but neglected to obtain a warrant before doing so.

Four members of the Court agreed that the petitioners had a reasonable expectation of privacy in the films, and that the warrantless projection of these films, without consent or exigent circumstances, constituted a search that infringed on the petitioners' Fourth Amendment rights. Although these

four Justices disagreed on whether a complete search by the private party would justify a subsequent official search without a warrant, they held that, in this case, the fact that the cartons and one or more of the individual boxes were opened by a private party did not excuse the FBI's failure to obtain a warrant before screening the films. A screening of an entire motion picture film is necessary in order to ascertain:

> "(a) whether 'the average person, applying contemporary community standards' would find that the work, taken as a whole, appeals to the prurient interest...; (b) whether the work depicts or describes, in a patently offensive way, sexual conduct specifically defined by the applicable state law; and (c) whether the work, taken as a whole, lacks serious literary, artistic, political, or scientific value." (Emphasis added). Miller v. California, 413 U.S. 15, 24 (1973).

Mr. Justice Marshall concurred in the judgment reversing the petitioners' convictions based on the films, but expressed no opinion on the legal reasoning.

Defendant in the instant case asserts that, by analogy, the Government's warrantless testing of the drug samples gathered both by Professor Jolly and the Drug Enforcement Agency ("DEA") Agents, standing alone, constitutes a "search" which infringed on his Fourth Amendment rights. I do not agree. Even if we assume that the testing of chemicals is similar to the viewing of materials protected by the First Amendment, the case before this Court differs markedly from the Walter case.

The protection of the Fourth Amendment only applies where a person has exhibited an actual expectation of privacy, and where that expectation is recognized by society as reasonable. See, e.g., Rakas v. Illinois, 439 U.S. 128, n.12 (1978); Katz v. United States, 389 U.S. 347, 361 (1967) (Harlan, J., concurring). The Court in Walter found that the petitioners had a reasonable expectation of privacy in the films, largely because the twelve cartons were initially sealed and gave no indication of their contents. By contrast, the chemicals seized from the lab by Professor Jolly and the DEA agents were in open dishes (see Transcript of Hearing dated December 12, 1979, p.296), or in containers that were both translucent and bore some indication of the nature of their contents. See, Memo-

randum and Order dated May 27, 1980, pp. 6-7. These open dishes and translucent containers hardly justify a finding that defendant exhibited a subjective expectation of privacy, and, in any event, society would not recognize such an expectation as reasonable. Although the lab itself was fairly secure and access thereto restricted as to the general academic community, there were a number of graduate students and other persons who had keys. At least two of these graduate students, as well as Professor Jolly, were outside the alleged conspiracy. To leave substances open to their casual inspection, on lab benches or in other common areas, is inconsistent with any reasonable expectation of privacy. Therefore, I con-

clude that the tests by the Government on samples collected from defendant's laboratory, even though performed without a warrant, did not infringe upon defendant's constitutionally protected interests.

Assuming for the argument that defendant did have a reasonable expectation of privacy in these samples, the Walter case may also be distinguished from the case at bar on the grounds that no consent was given for the warrantless projection in Walter, whereas here the Government tests were conducted with third party consent. The "clearly established rule" on third party consent in this Circuit, adhered to in this Court's Memorandum and Order of March 27, 1980, is that:

> "consent to a search by one with access to the area searched, and either

> common authority over it, a substantial interest in it or permission to exercise that access, express or implied, alone validates the search."

United States v. Gradowski, 502 F.2d 563, 564 (2d Cir. 1974); United States v. Pravato, 505 F.2d 703 (2d Cir. 1974); United States v. Jenkins, 496 F.2d 57 (2d Cir. 1974), cert. denied 420 U.S. 925 (1975).

Richard Macris, the NYU student and laboratory assistant to Professor Buettner-Janusch, had both access to the substances in question and permission to exercise that access. As a laboratory assistant, he had a key to the lab and full use of all the chemicals therein, and he frequently performed experiments relating to the substances themselves, at defendant's request. That Macris stopped coming to the lab on

April 20, 1979 due to a feigned illness is of no consequence, for he was expected to return and continue his work when his health permitted. It is true that Macris never explicitly consented to the Government's analysis of Jolly's samples or the substances siezed by DEA agents on May 17, 1979. However, he was present both when Jolly's samples were turned over and when the substances were seized from the laboratory, and he knew that the Government would perform tests to determine whether controlled substances were being made. Therefore, I conclude that his actions implied consent for the Government analysis. See, United States v. Candella, 469 F.2d 173 (2d Cir. 1973).

Similarly, as is more fully discussed in my Memorandum and Order dated March 27, 1980, Professor Jolly

also had the necessary access, and permission to exercise that access, to provide third party consent himself for the Government's tests of the samples acquired.

Before leaving our discussion of the laboratory, we note that at the initial suppression hearings in this case, the Government conceded the defendant had a reasonable expectation of privacy in the laboratory, and our prior determinations have been based upon that assumption. In actuality, the Court doubts that there was any reasonable expectation of privacy with respect to any part of the laboratory, except the locked desk of the defendant. The record shows that the laboratory could be entered at any time through the adjoining laboratory of Professor Jolly from a freight elevator, capable of carrying

passengers, and commonly used to carry passengers. Jolly's laboratory was connected by a wide-open archway with Dr. Buettner-Janusch's laboratory. Also, as we noted, a large number of persons, many of whom were not co-conspirators, and some others arguably not co-conspirators, were regularly engaged in and about the laboratory, as graduate students in the Department or assistants or employees assigned to work with this defendant or Professor Jolly. Included in this large group are the following, among others:

Richard Macris
Professor Jolly
Patricia Karatsis Berman
Lon Alterman
Rhea Trienken
Lisa Forman
Jeff Rogers
Larry Cytryn
Lisa Lewis
David Klein

These knowledgeable persons would have perceived what was transpiring. Defendant apparently caused the locks to the entrance to the laboratory to be changed from time to time, a procedure not unusual in a semi-public building where students and student assistants come and go over the years. But his professional colleague, Professor Jolly, who had been authorized to use the lab, and always possessed a key, was capable of perceiving the claimed improper conduct. Along with others, he had adequate education and professional skills to enable him to perceive the nature of the ongoing conduct in the lab. Standing alone, this simple act of giving Jolly a key to the lab negates any reasonable expectation of privacy.

The validity of the Court's conclusion in this regard has been confirmed by subsequent testimony at trial. Mrs. Berman, a graduate student, detected the apparent irregularities being conducted in the darkroom in furtherance of the conspiracy, and was so incensed by this abuse of academic freedom in making drugs on University property that she sabotaged the "experiment." According to her testimony, she changed a light bulb in the darkroom, replacing a "safelight" with a regular light bulb that was colored red, thereby affecting the lighting conditions. She also destroyed or poured out a number of flasks that were located in the cold room. When defendant learned that his "experiment" had been tampered with, he "screamed down the hall" that "the

project had been messed up and that a previous graduate student had ripped him off." That defendant incorrectly blamed a student other than Mrs. Berman is further evidence that many students had access to the lab and the experiments therein.

We have previously quoted in our Memorandum and Order of March 27th a recorded conversation between this defendant and Richard Macris on June 1, 1979, in which he discusses with Macris the ongoing investigation of his activities. As noted in some detail in footnote 6 of that opinion, and as appears from the entire transcript, defendant on June 1, 1979, prior to his Indictment, but after the investigation had begun, attributed his difficulties with the law to the fact that "an informer***someone got picked

up with something and said he got it from B-J's lab, someone took something from the lab and s--, and got caught which is entirely possible*** You know how open, you know how careless we are with that," to which Macris remarked "Yeah, that lab's always open, anyone could have just walked in there." Defendant on tape did not dispute that statement by Macris. In truth, he had no reasonable expectation of privacy.

Accordingly, defendant's motion to suppress certain physical evidence taken from defendant's laboratory is denied.

So Ordered.

Dated: New York, New York
July 7, 1980

Charles L. Brieant
U. S. D. J.

F O O T N O T E

1. As reargument was heard immediately prior to trial, the Court announced its decision by an oral direction with the intention of preparing and filing this memorandum decision at a subsequent date.

APPENDIX E

OPINION OF JUDGE BRIEANT
(Filed October 29, 1980)

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

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UNITED STATES OF AMERICA :

-v- : 79 Cr. 0710-CLB

JOHN BUETTNER-JANUSCH, : MEMORANDUM AND ORDER

Defendant. :

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Brieant, Jr.

On July 16, 1980, following a trial by jury, the Defendant, John Buettner-Janusch, was convicted of (1) conspiracy to manufacture and distribute and possess with intent to distribute certain controlled substances (21 U.S.C. §§812, 841(a)(1), 841(b)(1)(B) and 841(b)(2), ("Count One"); (2) actual manufacture and possession of methaqualone with intent to manufacture and distribute (21 U.S.C. 812, 841(a)(1),

841(b)(1)(B), and 18 U.S.C. §2), ("Count Two"); (3) knowingly making false statements to Government investigators (18 U.S.C. §1001), ("Counts Five and Six"). He was found not guilty by the jury of distribution and possession with intent to distribute a quantity of Cylert pemoline (21 U.S.C. §§ 812, 841(a)(1) and 841(b)(2), ("Count Three") and acquitted by the Court of conspiracy to obstruct justice (18 U.S.C. §§ 371, 1001, 1503 and 1510), ("Count Four").

By motion filed September 16, 1980, the Defendant moves, pursuant to Rule 29(c), F.R. Crim, P., for a judgment of acquittal notwithstanding the verdict. In the alternative, the Defendant seeks an order pursuant to Rule 33, F.R. Crim. P., granting him a new trial. Defendant reasserts his objections to various pre-trial

rulings and to the special verdicts and jury charge; challenges the sufficiency of the evidence on all counts; and specifies trial errors which he claims denied him a fair trial. Oral argument was heard on September 16, 1980 and the motion was fully submitted as of October 21, 1980.

Familiarity with the previous decisions of this Court, dated March 28, 1980, May 27, 1980, June 27, 1980 and July 7, 1980, is assumed.

Upon considering the Defendant's contentions in light of the applicable standards, the Court denies both motions. The Court finds that the evidence presented at trial is more than sufficient to sustain the verdict. There was adequate proof in the record from which a reasonable jury could find guilt beyond a reasonable

doubt. See Glasser v. United States, 315 U.S. 60, 80 (1941). Nor has the defendant succeeded in satisfying the lesser standard for a grant of a new trial. Neither the claim that the verdict is against the weight of the evidence nor the alleged trial errors require a new trial in the interests of justice." See 8A Moore, Federal Practice §33.02 (rev. ed. 1980).

We now turn to examine the Defendant's specific contentions to the extent not fully covered by prior rulings or decisions of the Court. Defendant contends that the Court erred in deciding his earlier motions: 1) to strike prejudicial surplusage from the indictment, Rule 7(d), F.R. Crim. P.; 2) to dismiss Count Six of the indictment on the ground that it is duplicitous, Rule 12(b), F.R. Crim. P.; 3) to dismiss the indictment on the ground

of grand jury abuse, Rule 12(b)(1), F.R. Crim. P.; 4) to sever Counts One through Three, Rule 9(a) & 14, F.R. Crim. P.; 5) to dismiss the indictment, Rule 12(b)(1), F.R. Crim. P. and the Fifth and Sixth Amendments to the United States Constitution, or alternatively to suppress tape records and derivative evidence, Rule 12(b)(3), F.R. Crim. P.; Amend. IV, V, VI & IX, United States Constitution; 18 U.S.C. §2515 and inherent supervisory power of the Court; and (6) to suppress all items seized before and during May, 1979 from the defendant's Anthropology Laboratory. Defendant also reasserts his objections to the use of special verdicts on Count One and to the jury charge. As to the majority of these issues, the defendant merely reasserts his stated objections, refers the Court to his initial submission of papers and presents no new facts or

arguments. Because the defendant presents no reason to alter the initial determination of these issues, the Court, at this juncture, adheres to its prior resolution of these issues, for the reasons stated respectively, when these motions or objections were decided initially.

Defendant does readdress the suppression motion on additional grounds. (Deft. Br. Pt. II.) He contends that the evidence seized by Prof. Jolly and Mr. Cornyetz after May 2, 1979 ought to be suppressed. Recognizing that the Fourth Amendment proscriptions only limit Government action, Defendant argues that the evidence seized by Jolly should be suppresses because he was or had become a Government agent for Fourth Amendment purposes, after May 2, 1980, or alternatively, because the Government was aware that he was intending

to conduct an unauthorized search and failed to prevent this. Assuming arguendo, that proof of these facts would require the suppression of probative evidence received at trial, the argument fails because it is not supported by the facts. There is no evidence that the Government kenw of Professor Jolly's identity, or even of his existence, prior to May 17, 1980 when he first met with officials from the United States Attorney's Office for the Southern District of New York. Although the United States Attorney's Office for the Eastern District had arranged, through several intermediaries, for a confidential testing of certain chemicals on May 2, 1979, that office was unaware of the identity of the person providing the substances. There is no evidence that after May 17, 1980 the

Government participated, supervised or was aware of any searches conducted by Prof. Jolly. The Court, therefore, adheres to its prior findings and conclusions of March 27, 1980 that the actions of Prof. Jolly and Mr. Cornyetz in seizing materials from the laboratory were the actions of private individuals. The Court also adheres to its prior determinations that there was valid third-party consent to the Government search conducted on May 17, 1980, and that Defendant did not have a reasonable expectation of privacy in the laboratory. (Memo and Order, March 27, 1980).

During oral argument, Defendant's attorneys cited additional authority to the Court as they recounted their position on earlier motions. These cases do not require any change in the Court's initial findings.

We turn next to consider Defendant's arguments concerning the sufficiency of the evidence at trial. The Defendant argues that the evidence on Counts One, Two, Five and Six was insufficient for a reasonable jury to find guilt beyond a reasonable doubt, and alternatively that the verdict was against the weight of the evidence requiring a new trial in the interests of justice. The Court finds that the evidence was sufficient to sustain the jury verdict and that neither the weight of the evidence nor the alleged errors in receiving certain evidence requires a new trial.

a) Count One

In addition to a general verdict on Count One, the jury answered three questions on a Special Verdict in the affirmative indicating that they found the Defendant guilty of conspiring to manufacture, dis-

tribute and possess with intent to distribute each of the three controlled substances charged in the indictment, namely, Lysergic Acid Diethylamide ("LSD"), Methaqualone, and Barbitol (Sodium Barbitol).

Regarding the conspiracy to manufacture, distribute and possess with intent to distribute LSD, the Defendant first argues that the physical evidence introduced at trial negates the existence of any conspiracy. Government Exhibit 35, a note written by Dr. Buettner-Janusch was purportedly introduced to show the second step in the manufacture of LSD. Contrary to the Defendant's contentions, however, the fact that the note by chemical symbol expressed a direction for the use of nitric acid rather then nitrous acid does not conclusively establish that the Defendant was not attempting to manufacture LSD. The weight and significance

of this discrepancy presented an issue to be determined by the jury. The second tangible piece of evidence the Defendant challenges concerns diethylamine, an essential ingredient in the manufacture of LSD. Defendant claims that the only tangible evidence of the presence of this chemical in the laboratory was a photograph of one sealed bottle and an invoice showing delivery of two bottles on May 12, 1977. (Govt. Ex. 33K). This evidence shows that those bottles of diethylamine were present in the laboratory. It does not compel an inference that all was used earlier. There was testimony from the Government chemist, Weber, as to the saml1 amount actually necessary. (Tr. 1367-68). Nor does this tangible evidence negate Dr. Buettner-Janusch's admissions to Mr. Dorfman, for example, that he was going

to make LSD (Tr. 118) and that LSD in plain view on May 17, 1980 was a decoy and the real LSD was hidden in the cold room (Tr. 155). Although the defendant claims that the Government has, at best, proven only the passive receipt of statements as to the Defendant's intention to make LSD with the aid of the co-conspirator, the existence of an agreement need not be proven directly but may be inferred form such statements and subseuqnet joint participation in the venture. See United States v. Taylor, 562 F.2d 1345, 1352 (2d Cir.), cert. denied sub nom. Salley v. United States, 432 U.S. 909 (1977); United States v. Varelli, 407 F.2d 735, 741-42 (7th Cir. 1969).

Defendant contends that the evidence regarding a conspiracy pertaining to barbitol and methaqualone is insufficient because it is based upon the testimony of

Mr. Dorfman and Mr. Cornyetz. His first argument is that such "vague, sketchy and dubious testimony of involved and implicated parties, is, as a matter of law, an insufficient basis for a verdict of guilt." (Deft. Br. 15.) There may well come a point where, as the Defendant contends, any number of witnesses considered alone or together are so incredible and unreliable that their testimony cannot as a matter of law constitute sufficient evidence upon which a reasonable jury could base a guilty verdict. That is not, however, the situation in this case. Such a conclusion is not an inference compelled because the witnesses initially gave testimony exculpatory to Defendant, received immunity, and then recanted and testified for the Government. Many successful prosecutions depend on the testimony of former

accomplices and co-conspirators. Such persons usually give varying accounts of their own activities as the investigation progresses. What the law does require is that such exculpatory statements of government witnesses be disclosed to the Defendant, see, United States v. Agurs, 427 U.S. 97 (1976); Brady v. Maryland, 373 U.S. 83 (1963), and that jury be informed of all agreements or deals between the Government and such accomplice witnesses. Thereafter, their credibility is for the jury, unless they are so depraved and uncorroborated that no reasonable juror could believe their testimony. At this trial, the jury was instructed in the approved fashion that, in considering the credibility of Mr. Dorfman and Mr. Cornyetz, it should recognize that, by their own testimony, they were accomplices whose testimony must be viewed with caution. (Tr. 2065-68).

Defendant's second argument is that the testimony of these two witnesses, Dorfman and Cornyetz, is tainted by the use of illegally-seized evidence in questioning these witnesses. Wong Sun v. United States, 371 U.S. 471 (1963). The defendant refers specifically to the barbitol seized on August 2, 1979 from the basement storage area and chemical precursors of LSD seized on May 17, 1979. These illicit items were suppressed by this Court. (Deft. letter, September 22, 1980.) Considering the factors enunciated by the Supreme Court in United States v. Ceccolini, 435 U.S. 268 (1977), I find there is a sufficient attenuation between the illegally-seized evidence and the testimony of these two witnesses at trial. The suppressed evidence was relatively minor in comparison to the evidence lawfully

obtained by the Government from the laboratory. The Government has demonstrated that the identity of Mr. Cornyetz was known prior to the May 17, 1980 search and that seizure of ergotamine tartrate was not used in questioning him or seeking to obtain his cooperation. Likewise, no mention was made of this evidence during the negotiations which resulted in Mr. Dorfman's cooperation. (Affid. of AUSA Roanne L. Mann, filed October 1, 1980.) The Government has also demonstrated that it had knowledge of the presence of these substances in the laboratory independent of the seizures. (Affid. P.3) Recognizing that "the exclusionary rule should be invoked with much greater reluctance where the claim is based on a casual relationship between a constitutional violation and the discovery

of a live witness than when a similar claim is advanced to support suppression of an inanimate object," 435 U.S. at 280, the Court concludes that the testimony was properly admitted at trial.

b) Count Two

Count two of the indictment charged the Defendant manufactured and possessed with intent to distribute methaqualone. The Defendant's argument in support of the motion is based on the provenance of the methaqualone introduced at trial. The Government introduced six plastic jars containing methaqualone in various stages of purification that were seized from the Defendant's laboratory during the Government search on May 17, 1980. Evidence of the "melting points" of the substances recorded in the laboratory notebook by Cornyetz on May 17th was

introduced and compared with the melting points of the substances seized by the Government as computed by a chemist of the Drug Enforcement Agency following such seizure. Defendant's argument relies on the opinion testimony of his expert witness, Dr. Arthur Rosenthal, that the substances introduced at trial were not the same substances in the laboratory on the afternoon of May 17, 1979. Defendant's argument assumes the accuracy of Cornyet'z tests and argues that the DEA's tests were likewise accurate. From these assumed facts we are asked to infer that the witness Jolly, contrary to his sworn testimony at trial in the suppression hearing, fabricated these exhibits after Cornyetz ran his tests and before the DEA ran its tests. This dispute is merged in the verdict.

Our jurors were adequately situated to resolve the credibility of the witnesses. The trial record neither permits nor requires a finding by the Court that Prof. Jolly, rather than the conspirators, made the methaqualone seized in the laboratory, or that these exhibits "could not possibly be" the same substances tested by Cornyetz under Defendant's personal supervision on the afternoon of May 17, 1979, and accordingly, that a reasonable juror acting reasonably could not find guilt beyond a reasonable doubt. Nor is it contrary to the wieght of the evidence.

c) Count Five

Defendant includes Count Five in his motion for a judgment of acquittal based on the insufficiency of the evidence. No further reference has been

made to Count Five, however, in the Defendant's Brief or subsequent submissions to the Court. There was ample evidence produced at trial from which a reasonable jury could find that, contrary to his representations to an Assistant United States Attorney, Dr. Buettner-Janusch was aware that methaqualone was a controlled substance.

d) Count Six

We note initially that, although the Defendant "argued vigorously and repeatedly that Count Six was duplicitous" (Deft. Supp. Br. 7), he failed to move during the trial for the withdrawal of any defective specification. The Government urges that such failure may well preclude a post-trial claim of insufficiency. See United States v. Bonacorsa, 528 F.2d 1218, 1222 (2d Cir.),

cert. denied, 426 U.S. 935 (1976). The Court does not rely on this contention. Legal questions in criminal trials should be resolved on the merits, and the Court never perceived that this Defendant intended to or did abandon any of his pretrial contentions.

Defendant claims that because the Count is duplicitous, the jury verdict is legally insufficient if the proof at trial was insufficient as to any statement. This Court has previously ruled that Count Six charged "multiple means constituting a single and continuing offense." (Memo. & Order, March 27, 1980). The jury was instructed that it could properly find guilt beyond a reasonable doubt only if it was unanimous as to the wilful falsity of at least one of the statements and also unanimous as

to which one. (Tr. 2117.) See United States v. Bonacorsa, supra; United States v. Edmondson, 410 F.2d 670, 673 n.6 (5th Cir. 1969); Arena v. United States, 226 F.2d 227, 236 (9th Cir. 1955).

There was sufficient evidence from which the jury could conclude beyond a reasonable doubt that the Defendant wilfully answered falsely. Any claim of imprecision or ambiguity in the prosecutor's questions, and any issue of what interpretation this intelligent, educated and fluent Defendant placed on the questions, presented factual issues for the jury to decide. See United States v. Corr, 543 F.2d 1042, 1049 (2d Cir. 1976). The Court also adheres to its prior determination that the answers are not legally insufficient as a matter of law to constitute a violation of 18 U.S.C. §1001.

Claimed Errors at Trial

We now consider the claims of error at trial or prosecutorial misconduct that Defendant asserts warrant a new trial. Over objection by Defendant, the Court received the testimony of Prof. Dale Eichelman, Defendant's academic subordinate at New York University, regarding a conversation in August, 1979 during which the Defendant urged that Eichelman not write a requested letter of reference for Mr. Cornyetz to this Court (Judge Lowe), to be used in mitigation of punishment for his own participation in the conspiracy. This testimony was properly admissible as evidence of consciousness of guilt. Consideration of the standards enunciated in Rule 403, F.R. Evid. did not require its exclusion. The motivation of the statement by Defendant to Prof.

Eichelman, a jury could find, was to forestall a favorable letter to which the Government's cooperating individual, Cornyetz, was presumably entitled, and thereby indicate to that potential witness the power which Defendant possessed in academic circles, and his ire brought on by the fact that his co-conspirator had shifted loyalties from the Defendant to the Government. Accomplice witnesses, probably as a natural result of their inherently dissolute character, often cooperate only intermittently, shifting their loyalties back and forth between the Government and their former partners in crime. By his statement to Eichelman, Professor Buettner-Janusch sought to impede the efforts of the Government to keep Cornyetz cooperating until trial. Although a cooperator may believe other-

wise, the Government, at least in this district, had no effective control over what Cornyetz's sentence would be. Failure to get the letter to which he was entitled might have led to a more stringent sentence for Cornyetz, which he would interpret as a breach of faith and cease cooperating.

Defendant also challenges the admissibility of Government Exhibit 18 and 18A, a tape recording of the June 5, 1979 conversation between Mr. Macris and Mr. Cornyetz. Prior to the playing of this tape, the jury was instructed that the tape was being received subject to connection on Count Four only, which charged Professor Buettner-Janusch with a conspiracy to obstruct justice. The trial jury was told specifically that because the Defendant was not a partici-

pant, it was not admissible on Count One, but available only on Count Four, and also in evaluating Mr. Cornyetz's credibility. (Rule 801(d)(1)(b) F.R. Evid.) The jury was expressly and clearly cautioned that the conversations were being taken only for these two limited purposes. (Tr. 491.) The jurors were also admonished not to consider any of the statements made by Mr. Macris on the tape because he was no longer a member of any conspiracy under either Count when the conversation took place. (Tr. 493.) The Court ultimately dismissed Count Four. As the jury had been instructed prior to hearing the tape, that it could not consider it as evidence on Count One, it remained available only insofar as it assisted in weighing Cornyet'z credibility. Additionally, to the

extent that the tape may have contained prior inconsistent statements of Cornyetz, the Government was entitled to elicit that adverse information on direct examination as bearing on his credibility, without awaiting its possible use by Defendant on cross-examination.

In reliance on United States v. Geaney, 417 F.2d 1116 (2d Cir. 1969) and its progeny, Defendant urges that there "was not a fair preponderance of the evidence with respect to the conspiracy **** independent of hearsay declarations of co-conspirators, to allow the admission into evidence of statements by co-conspirators pursuant to Rule 801(d)(2) F.R. Evid." (Deft. Mot. p.3.) We commence our discussion by noting that the sworn testimony of co-conspirators (accomplices) who testify at trial to the acts which the defendant himself committed

in their presence, and statements he made in their presence, as well as adoptive admissions by Defendant resulting from Defendant's silence when events were taking place or words being spoken in his presence in furtherance of the conspiracy, are not hearsay.

The Geaney case concedes that the discussion "relates only to utterances whose receipt in evidence would otherwise be banned by the hearsay rule" and that "'Acts' of the other conspirators stand on quite a different basis." 417 F.2d at 1120 n.3.

The relevant portion of Geaney relied upon is found at pages 1120, where the Court of Appeals said:

> "While the practicalities of a conspiracy trial may require that hearsay be admitted 'subject to connection,' the judge must determine, when all the evidence is in, whether

in his view the prosecution has proved participation in the conspiracy, by the defendant against whom the hearsay is offered, by a fair preponderance of the evidence independent of the hearsay utterances. If it has, the utterances go to the jury for them to consider along with all the other evidence in determining whether they are convinced of defendant's guilt beyond a reasonable doubt. If it has not, the judge must instruct the jury to disregard the hearsay or, when this was so large a proportion of the proof as to render a cautionary instruction of doubtful utility, as could well have been the case here, declare a mistrial if the defendant asks for it. Since we must assume on appeal that the trial judge was satisfied of the existence of a conspiracy on the basis of non-hearsay evidence the question becomes whether he had reasonable grounds to be so."

Geaney does not hold that the trial judge must engage in some meaningless recital of some sort of litany which would show that he has read and considered the Geaney case, and has reached the conclusion that the hearsay utterances are admissible. Nor does Rule 104 F.R. Evid. require such a procedure. Failure to strike hearsay offered subject to connection under the Geaney rule, followed by a submission of a conspiracy count to the jury, must be read to constitute an implied finding that the Government has proved the existence of the conspiracy at least by a preponderance of the credible non-hearsay evidence, and that Defendant and the hearsay declarant were members of it. The post-Geaney case of United States v. Valencia, 609 F.2d 603, 631 (2d Cir. 1979) holds that

the Geaney fulr (if it is still required to be made in view of Rule 104 F.R. Evid.) may be made "implicitly when the Court admitted the statements over the defenses objections."

The intellectual basis of the Geaney opinion is derived from Judge Hand's famous opinion in United States v. Dennis, 183 F.2d 201, 230-231 (2d Cir. 1950), aff'd 341 U.S. 494 (1951). The Dennis case, and its predecessor United States v. Renda, 56 F.2d 601, 602 (2d Cir. 1932), a per curiam opinion, determined, in the Geaney decision, also to have been written by Judge Hand, assume that membership in a conspiracy by the Defendant on trial may be proved on an entire trial record,

including the hearsay utterances admitted by the trial Court, once the trial Court had been satisfied that the Geaney threshold for admissibility had been attained.

The writer, with due respect to the memory of the great Judge Hand, has always had misgivings about the use of co-conspiratorial hearsay to prove membership of the Defendant on trial in a conspiracy. Accordingly, in this case, and in a large number of prior cases, this Court has charged the jury, usually without any exception by the Government, and without any comment on the part of various appellate reviewing panels, that:

> "I caution you that in determining whether a conspiracy existed, you should consider the acts and declarations of all the alleged participants. However, in determining whether this defendant was a member of the conspiracy, you must consider only his acts and statements and not what some others may have said or done. He cannot be bound

> by the acts or declarations of other participants unless it is established that a conspiracy existed and he was one of the conspirators."

(Tr. pp. 2091-92.)

This is approved jury instruction and legal theory followed in the First and Third Circuits. It is commanded by logic and fairness. For an interesting discussion of this point, see Koeltl & Tuerkheimer, Judge Weinfeld and the Criminal Law: The Keogh-Kahaner Trial--A Case Study in Criminal Justice, 50 N.Y.U. L. Rev. 1008, 1034-39 (1975). We note in passing that long after Geaney was decided, the Federal Rules of Evidence became effective on July 1, 1975. In that new code, the admissibility of the hearsay statements of a co-conspirator was codified, by a legislative finding that such statements are not hearsay. Like Humpty Dumpty in "Through the

Looking Glass," a legislative body, when it uses a word such as "hearsay," can make that word mean what it wants it to mean. Rule 801(d)(2)(e) provides that "a statement is not hearsay if * * * * the statement is offered against a party and is * * * * (e) a statement by a co-conspirator of a party during the course and is furtherance of the conspiracy."

Much of the discussion on this point appears to be academic in the context of the Buettner-Janusch trial. The co-conspirators Coynetz and Dorfman actually testified and were available for cross-examination. In retrospect, the Court cannot think of any hearsay statements of Greenfield, who did not testify, which were probative of Buettner-Janusch's guilt or more than merely cumulative. None are cited in the post-verdict motion.

No error is perceived with respect to the receipt of hearsay declarations in this trial.

Defendant also claims that improper remarks by the prosecutor during her summation deprived him of his right to a fair trial. The prosecutor referred to the failure of the Defendant to call Dr. Elwyn Simons, the director of Duke's lemur facility, to support his factual theory that he was manufacturing drugs not for street use, but solely in connection with his highly scientific lemur research, which necessitated a higher quality dope than concededly available from prestigious licensed manufacturing chemists required to adhere to purity standards of the United States Pharmacopoeia.(1)

This Court is satisfied that the Assistant United States Attorney believed that she was within the limits of lawful

comment when she made the remarks complained of. On this point the Government relies on United States v. Barnes, 604 F.2d 121, 148 (2d Cir. 1979) and United States v. Bubar, 567 F.2d 192, 199 (2d Cir. 1977). This Court does not agree that the remark was a proper remark, but I am satisfied that it was sincerely uttered, with reliance on a good-faith belief that it was proper argument under the cases mentioned above, and that there was no intention to strike a low blow on the part of the Government. Nor was it necessary because no reasonable juror could have put much stock in the lemur research claim. In his post-verdict motion Defendant has escalated this claimed impropriety beyond the significance, if any, to which it is entitled in the context of the entire trial record. Accordingly, we quote a substantially com-

plete version of the entire argument complained of.

> "Ms. Mann: But if there was any truth to the defendant's cover story, then, ladies and gentlemen, I submit to you that there was one man who would have had firsthand knowledge of the defendant's lemur project, and that was Dr. Elwyn Simons, the director of Duke's lemur facility. Because, ladies and gentlemen, if Buettner-Janusch was really making drugs to use on Dr. Simons' lemurs, he certainly would have talked to Dr. Simons, he would have obtained his approval before he started making pounds of the stuff in his laboratory. But, ladies and gentlemen, the one scientist that Buettner-Janusch did not bring to this courtroom was Elwyn Simons.
>
> Mr. Ritholz: Your Honor, I beg your pardon.
>
> The Court: Strike out that argument. I will instruct the jury at this time that the defendant does not have to prove his innocence. The duty of proving guilt beyond a reasonable doubt is a burden the government has. It remains with the government at all times during the trial and during your deliberations in the juryroom.

Furthermore, this doctor accessible by subpoena to anyone, including the United States Attorney.

So I am striking out that argument. It is an improper argument that has no basis. Put it out of your minds.

Mr. Ritholz: I make a motion for a mistrial.

The Court: Your motion for a mistrial is denied on that ground. I gave my instruction.

Ms. Mann: Your Honor, you know from the evidence presented during this trial that Elwyn Simons was never told about this project.

The Court: He is stricken out of your discussion.

Ms. Mann: Your Honor --

The Court: You listen to me unless you want a mistrial. No more about Simons. He was equally accessible."

The Court believes that these instructions were adequate to cure any error resulting from the improper argument. The Court's position on this point was reiterated fully in the jury charge where it

was clearly emphasized that the Government had the burden of proof beyond a reasonable doubt that the Defendant was presumed innocent and did not have to prove his innocence.

The defendant also claims that the prosecutor improperly placed the Government's credibility in issue. In her rebuttal summation, the prosecutor responded to the defense attorney's summation argument that the Government got Mr. Dorfman and Mr. Cornyetz to lie, by arguing that if the jury believed "the government is participating in a frame of this man . . . then walk right out of the jury room and return a verdict of not guilty." (Tr. 2035.) A prosecutor should not bolster a case by placing the prestige of the Government behind the credibility of its witnesses. In this case, the prosecutor's brief reference was made in response to an argu-

ment chosen by the Defendant. Under these circumstances, the prosecutor was entitled to respond to the defense contention and her statement was not prejudicially improper. See United States v. Stassi, 544 F.2d 579, 585 (2d Cir. 1976), cert. denied, 430 U.S. 907 (1977); United States v. Brawer, 482 F.2d 117, 133-34 (2d Cir. 1973), cert. denied, 419 U.S. 105 (1974); United States v. LaSorsa, 480 F.2d 522, 525-26 (2d Cir.) cert. denied, 414 U.S. 855 (1973).

For the foregoing reasons the Defendant's motions for a judgment of acquittal or a grant of a new trial are denied.

So Ordered.

Dated: New York, N.Y.
October 29. 1980.

Charles L. Brieant
U.S.D.J.

FOOTNOTE 1

Methaqualone, commonly sold under the trade name of Quaalude, is a prescription drug manufactured by one or more manufacturing chemists according to federal quality control standards found in the United States Pharmacopoeia. Their manufacturing facilities and personnel are probably better adapted to producing a consistently high quality product, than are those of the New York University Anthropology laboratory. Furthermore, the conspirators in this case purchased enough raw materials to make sufficient methaqualone to zonk out all the lemurs in the United States and keep them in a perpetual state of euphoria. It is a tribute to the Defendant's audacity that he is able to assert this claim with a straight face, and has been successful in having his friends and associates believe it, and support him in his attempt to prove its validity.

APPENDIX F